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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

KONIAG, INC.

Petitioner,

v.

OMAR STRATMAN, *et al.*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Rule 60(b)(1) of the Federal Rules of Civil Procedure is the exclusive basis for reopening a case when it is alleged that a settlement agreement was entered into under a mutual mistake of fact.

II. Whether a mutual mistake of fact is an "extraordinary circumstance" which entitles a party to relief from a settlement agreement under Rule 60(b)(6) when that party has pursued enforcement of the agreement in state court.

III. Whether a party is entitled to relief from a settlement agreement under Rule 60(b)(6) on the grounds of mutual mistake when the party sought enforcement of the agreement in state court and the state court found that, at the time the agreement was entered, the party seeking rescission had knowledge that the agreement might be unenforceable.

IV. Whether the due process clause of the Fifth Amendment entitles the holder of a federal grazing lease on land subject to selection under ANCSA to actual notice of village eligibility proceedings where the leaseholder's interest constitutes a "valid existing right" which ANCSA expressly preserves.

V. Whether the due process clause of the Fifth Amendment entitles holders of a federal grazing leases on land subject to selection under ANCSA to actual notice of village eligibility proceedings where the regulations promulgated under ANCSA provide for notice and an opportunity to appear at a later stage in the proceedings to protect the integrity of such interests.

VI. Whether the due process clause of the Fifth Amendment entitles a person with only a recreational interest in land subject to selection under ANCSA to actual notice of village eligibility proceedings where the person is a shareholder which previously held an economic interest in the land at issue.

VII. Whether the holder of a recreational interest in land subject to selection under ANCSA is within the "zone of interests" protected by ANCSA, thereby entitling such person standing to assert an injury to that interest.

PARTIES

The plaintiffs in this case when it was before the United States Court of Appeals for the Ninth Circuit in 1981 were Omar Stratman, Toni Burton, John Murray, Michael Devers, James Schauff, and Brian Shafford.[1] Defendants were the then Secretary of the Interior,[2] Anton Larsen Bay, Inc., Bells Flats Natives, Inc.,[3] Leisnoi, Inc., and Koniag, Inc.

As this case was before the Ninth Circuit in 1994, plaintiff was Omar Stratman. Defendants were Bruce Babbitt, Secretary of the Interior, Leisnoi, Inc., and Koniag Inc.

Pursuant to Rule 29.1 of the Rules of the Supreme Court, Koniag, Inc. states that it has no parent corporations, subsidiaries (including wholly-owned subsidiaries/or affiliates) that have issued shares to the public.

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1 When the case was originally filed, the Kodiak-Aleutian Chapter of the Alaska Conservation Society was also a plaintiff. An amended complaint was subsequently filed omitting it as a party.

2 When this case was brought before the Ninth Circuit in 1981, the Secretary of the Interior was James Watt.

3 The district court concluded that because the villages of Anton Larsen Bay and Bells Flats had not been certified by the Secretary as eligible, *see Koniag, Inc. v. Kleppe*, 405 F. Supp. 1360 (D.D.C. 1975), *aff'd in part and rev'd in part sub nom. Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601 (D.C. Cir.), *cert. denied*, 439 U.S. 1052 (1978), any litigation over the eligibility of those villages was premature. *See* App. D, p. 26a. Plaintiffs did not seek appellate review of that holding. Neither Bells Flats nor Anton Larsen Bay were involved in the consideration of the case by the Ninth Circuit and they are not discussed further in this petition.

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OPINIONS BELOW

The 1981 opinion of the United States Court of Appeals for the Ninth Circuit, reported as *Stratman v. Watt*, 656 F.2d 1321 (9th Cir. 1981), appears as Appendix A. There were three opinions of the United States District Court for the District of Alaska. The first, rendered *sub nom. Kodiak-Aleutian Chapter of the Alaska Conservation Society v. Kleppe*, 423 F.Supp. 544

(D. Alaska 1976) appears as Appendix C. The Second, rendered *sub nom. Stratman v. Andrus*, is unreported and appears as Appendix D. The third, also unreported, was entered on remand from the Ninth Circuit,[4] *sub nom. Stratman v. Andrus*, and appears as Appendix F.

The 1994 opinion of the Ninth Circuit is unreported and appears as Appendix B. *Stratman v. Babbitt*, No. 93-36006 (9th Cir. Dec. 5, 1994). There was one opinion from the district court for the district of Alaska. This case is unreported and appears as Appendix G.

JURISDICTION

The first judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 8, 1981. Rehearing was denied on November 27, 1981. The second judgment of the Court of Appeals was entered on December 5, 1994 Rehearing was denied on February 22, 1995. The jurisdiction of this Court is invoked with respect to both judgments pursuant to 28 U.S.C. § 1254(1) (1988).[5]

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[4] The remand was unaccompanied by an opinion. It was issued to enable the district court to grant the federal defendant's motion for relief from judgment under Fed. R. Civ. P. 60(b).

[5] Rule 13 of the Supreme Court Rules requires that a petition be filed within 90 days after the entry of judgment. Although over a decade has passed since the Ninth Circuit's 1981 opinion in *Stratman v. Watt*, this petition is timely. As discussed *infra*, this case was originally settled before the Supreme Court could grant or deny certiorari. The case was subsequently reopened under Fed. R. Civ. P. 60(b)(6). This petition comes within 90 days of the Ninth Circuit's denial of rehearing on that issue.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties...

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall...be deprived of life, liberty, or property, without due process of law...

The relevant provisions of the Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971), *codified at* 43 U.S.C. §§ 1601 *et seq.*, are set forth in Appendix M. The relevant provisions of 43 C.F.R. §§ 2650 *et seq*. are set forth in Appendix K.

STATEMENT OF THE CASE

Plaintiffs originally filed this action to enjoin the Secretary of the Interior ("Secretary") from conveying any lands in Alaska to the Native village corporation of Leisnoi, Inc. (village of Woody Island), under the terms of the Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1971) *codified at* 43 U.S.C. §§ 1601 *et seq*. ("ANCSA").[6] The district court dismissed

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[6] Unless otherwise indicated, all ANCSA citations are to the 1988 edition of the official reporter. The relevant code sections are substantially identical to the 1976 edition, which was the current edition at the time this case was originally decided.

plaintiffs' claims for lack of jurisdiction and failure to exhaust administrative remedies. The Court of Appeals affirmed in part and reversed and remanded in part. The case was then settled pursuant to an agreement entered into between plaintiffs Stratman and Burton and defendant Koniag, Inc.[7]

More than ten years later, after the Alaska Supreme Court declined to hold Leisnoi[8] bound by the terms of the settlement agreement, Stratman moved pursuant to Fed. R. Civ. P. 60(b)(6) to reopen this litigation. The district court denied Stratman's motion. The Court of Appeals reversed. This petition followed to challenge both the Ninth Circuit's 1981 ruling in *Stratman v. Watt* and the Ninth Circuit's 1994 ruling in *Stratman v. Babbitt*.

ANCSA provides for the distribution of some forty million acres of federal land and $962,500,000 to Alaska Natives as a settlement of all aboriginal land claims. 43 U.S.C. § 1601 (1988); *see Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601, 604 (D.C. Cir.), *cert denied*, 439 U.S. 1052 (1978). Land benefits are distributed to Alaska Natives through Native villages and regional corporations established pursuant to ANCSA.[9] A village

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7 At the time the parties entered this settlement agreement, Koniag, Inc. was the successor in interest to Leisnoi, Inc. as a result of a merger between the two corporations. This merger is discussed *infra*.

8 At the time Stratman brought this action in state court, Leisnoi had demerged from Koniag. This demerger is discussed *infra*.

9 Each resident of an "eligible" village holds stock in that village corporation and in the regional corporation for that geographic region. 43 U.S.C. §§ 1606, 1607 (1988 & Supp V 1993).

may receive land benefits if the Secretary determines that the village is "eligible" to receive benefits.

The Act lists some villages by name and allows other villages to apply to the Secretary for certification. 43 U.S.C. § 1610 (1988). When an unlisted village applies for certification as an eligible village, the Alaska Area Director of the Bureau of Indian Affairs publishes notice of the application in the *Federal Register* and in one or more Alaska newspapers. 43 C.F.R. § 2651.2(a)(8) (1994).[10] The Area Director then makes a preliminary decision as to eligibility and publishes the decision in like manner. *Id.* Any "interested party" may protest the decision by filing a notice of protest within thirty days. *Id.* at § 2651.2(a)(9) (1994). The Area Director then reviews his preliminary determination. Persons who are "aggrieved" by the Area Director's decision may appeal to the Alaska Native Claims Appeals Board. *Id.* at § 2651.2(a)(10). The board's decision is subject to final approval by the Secretary. *Id.*

If the Secretary determines a village to be eligible, the village may select land from designated portions of federal land. The surface estate of selected land is conveyed to the village, and the subsurface estate is conveyed to the regional corporation. 43 U.S.C. §§ 1611, 1613 (1988). All conveyances are "subject to valid existing rights." *Id.* at § 1613(g).[11]

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10 All citations to the federal regulations are from the 1994 revision unless otherwise indicated. The relevant portions of the 1994 regulations are substantially identical to the 1980 regulations which were in effect when the Ninth Circuit considered this case in 1981.

11 Section 14(g) of the Act states:

> All conveyances made pursuant to this chapter *shall be subject to valid existing rights*. Where, prior to patent of any land or minerals under this chapter, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the

The native village of Woody Island (Leisnoi) applied for certification, and the Area Director published notice of the application. On March 19, 1975, the Secretary approved the certification of eligibility for the Village of Woody Island. 40 Fed. Reg. 12527 (March 19, 1975). On July 2, 1976, this suit was filed in the United States District Court for the District of Alaska to enjoin the Secretary from issuing patents to the Village of Woody Island. Jurisdiction was invoked pursuant to 28 U.S.C. § 1331(1976). Each of the plaintiffs alleged that they used some of the lands in question for recreational purposes. Complaint, ¶ 7. In addition, two of the plaintiffs, Stratman and Burton, alleged harm to property rights. They claimed that they owned federal grazing leases on land[12] which would be conveyed to Leisnoi if the village was certified. *Id.* at ¶ 6. They also alleged claims arising out of their ownership of a slaughterhouse facility on federal land.[13] Amended Complaint, ¶ 7.

> Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him.

Id. (emphasis added).

12 This land had been selected by the State of Alaska and tentatively approved by the United States for patent to the state under the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958). Complaint, ¶ V.

13 This claim was added later in an amended complaint. The claim was based on land which was earmarked for patent to the State of Alaska under the Alaska Statehood Act. After the State of Alaska made tentative selection of the lands underlying the slaughterhouse, the State released its rights to the Kodiak Island Borough, which in turn quitclaimed the property to the Kodiak Livestock Cooperative. Stratman and Burton were members of the cooperative. Amended Complaint, ¶ VII.

The Secretary moved to dismiss the complaint on the grounds that plaintiffs had failed to exhaust administrative remedies.[14] App. C, p. 21a. The district court held that Stratman and Burton were excused from their failure to exhaust administrative remedies. The court found that notice by publication was insufficient because they held property rights, and their names and addresses were easily ascertainable. App. C, p. 21a - 23a. However, with respect to the plaintiffs who did not assert property rights, the court found that notice by publication was sufficient. Thus, the court held, those plaintiffs holding only recreational interests were not excused for their failure to exhaust administrative remedies and, therefore, not entitled to judicial review. *Id.*

On September 7, 1978, Leisnoi relinquished its interest in the lands subject to Stratman and Burton's grazing leases. Shortly thereafter, Leisnoi quitclaimed to the Kodiak Island Borough all interest in the lands on which the slaughterhouse was located. The non-government defendants then moved to dismiss the complaint on the ground that the relinquishment and quitclaim divested the court of subject matter jurisdiction by eliminating any case or controversy.

The district court held that the relinquishment and quitclaim "remove[d] all dispute between Stratman and Burton over the land selections involving the federal

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14 The Secretary also moved to dismiss on the ground that plaintiffs had failed to join indispensable parties. App. C, p. 20a. The district sustained the Secretary's claim and gave Stratman and Burton opportunity to file and amended complaint. *Id.*

grazing leases and the slaughter-house."[15] App. D, p. 27a. Thus, the court concluded that there was no case or controversy, and Stratman and Burton did not have standing. *Id.* at p. 29a. In a subsequent decision,[16] as an additional grounds for dismissing Stratman and Burton's claims, the district court held that Stratman and Burton had no economic interests to assert because

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15 In addition, the court noted that Stratman and Burton did not appear to be the proper parties in interest because the leases were actually held by corporations. App. D, p. 27a n.1, & n.2 (citing Fed. R. Civ. P. 17(a)).

16 The actual procedural history of the case is complicated. When the district court held that Leisnoi's relinquishment and quitclaim extinguished any case or controversy, Stratman and Burton argued, in the alternative, that a dispute still existed because other land selections by Leisnoi injured their rights in certain state grazing leases. App. D, p. 27a - 28a. The court rejected this contention. The court found that, even if the state leases were relevant, Stratman and Burton could not be injured by the transfer of these lands to Leisnoi because section 14(g) of ANCSA made all transfers subject to valid existing rights. *Id.* at p. 28a-29a.

Plaintiffs appealed the decision. On January 30, 1979, while the appeal was pending before the Ninth Circuit, the federal defendant moved the district court pursuant to Fed. R. Civ. P. 60(b) for relief from judgment. App. J. In that motion, the government asserted that the court's 1976 decision (App. C), holding that Stratman and Burton were entitled to actual notice, was inconsistent with the court's October 16, 1978 decision (App. D), holding that Stratman and Burton could not allege any injury to property because section 14(g) protected all valid existing property interests. App. J. The federal defendant requested a clarification of this apparent conflict. App. J, p. 51a.

The Ninth Circuit remanded the case to the district court for consideration of the federal defendant's Rule 60(b) motion. *See* App. F. The district court agreed that there was a conflict between its 1976 and 1978 memorandum and order. The court noted that in its 1976 memorandum and order, it held that Stratman and Burton were entitled to actual notice of administrative proceedings because they held federal grazing leases on the land at issue. App. F. Therefore, they were not required to exhaust administrative remedies. *Id.* The court vacated this portion of the 1976 memorandum and order which entitled Stratman and Burton to actual notice. *Id.*

any transfers made under ANCSA were subject to "valid existing rights."[17] The court stated:

> This provision means that whatever property interests were held by Stratman and Burton, including the federal grazing leases, could not be injured by Woody Island's eligibility and the selection of land by its village corporation. Any patents issued to the village corporation would have to protect the property interests upon which the court had previously based its decision on exhaustion of administrative remedies.

App. F, p. 34a.

On September 8, 1981, the Ninth Circuit affirmed in part and reversed and remanded in part. App. A. The Ninth Circuit first addressed the issue of standing. The court found that Stratman and Burton did not have standing to assert economic interests because Leisnoi had disclaimed any interest in the lands at issue. However, the court held that they did have standing to assert recreational interests. *Id.* at p. 6a - 7a.

The Ninth Circuit then addressed the issue of notice. The court found that notice by publication was sufficient for those plaintiffs alleging only a recreational interest in the land. *Id.* at p. 8a. However, the court noted that at the time of Woody Island's application for certification, Stratman and Burton held record interests

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17 In a second case brought by Stratman against Leisnoi and Koniag, the district court followed this analysis and held that Stratman did not have standing because section 14(g) of ANCSA protected valid existing rights. *Stratman v. Andrus*, No. 79-116 (D. Alaska January 4, 1980) (order granting motion to dismiss).

in the land at issue. The court further noted that Leisnoi subsequently disclaimed any interest in this land. Nevertheless, the court concluded that Stratman and Burton were entitled to actual notice because the disclaimer did not occur until after the conclusion of the administrative proceedings. *See Id.* at p. 8a - 10a.[18] The court rejected defendants' argument that section 14(g) of ANCSA protected valid existing property rights. *Id.* at p. 9a n.4. Therefore, the Ninth Circuit remanded the case to the district court to determine whether Stratman and Burton were barred by exhaustion of remedies.[19] *Id.* at p. 11a.

Defendants petitioned this Court for certiorari to address the issues of standing and exhaustion of administrative remedies.[20] In 1982, before certiorari could be taken or declined by this Court, Stratman and defendant Koniag agreed to a settlement whereby, Stratman would dismiss this case if Koniag would quitclaim its interest in the land underlying the grazing lease.

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18 The court reasoned that Stratman and Burton would have been able to air their recreational grievances as well as their economic grievances at an administrative hearing. *Id.*

19 The ultimate conclusion of the Ninth Circuit regarding exhaustion of remedies is not completely clear. On one hand, the court concluded that Stratman and Burton should be entitled to actual notice. On the other hand, the court remanded to consider the exhaustion issue. In any case, for purposes of certiorari, Koniag affirmatively argues that Stratman was not entitled to actual notice and therefore not excused for his failure to exhaust administrative remedies. *See* discussion *infra*. Thus, a remand to consider the issue of exhaustion is unnecessary.

20 That petition was filed as No. 81-1564, for the October term, 1981.

At the time Stratman and Koniag entered this agreement, Leisnoi had merged with Koniag. However, this merger was later declared void ab initio,[21] and the surface estate in the land underlying the grazing was conveyed to Leisnoi. Leisnoi declined to convey the land to Stratman on the grounds that it was not a party to the agreement.[22] In late 1985, Stratman instituted an action in state court against Leisnoi seeking specific performance of the 1982 agreement or, in the alternative, damages against Koniag. *See Leisnoi, Inc. v. Stratman*, 835 P.2d 1202 (Alaska 1992). Stratman prevailed before the trial court. However, the Alaska Supreme Court reversed the trial court ruling and ultimately held that there was no enforceable contract between Stratman and Leisnoi. *Id.* at 1210-11.[23]

Stratman then moved the district court to reopen this case pursuant to Rule 60(b)(6). The district court denied Stratman's request. The Court of Appeals reversed the district court's decision on the ground that rescission of the settlement agreement was appropriate because of a mutual mistake of fact.

REASONS FOR GRANTING THE WRIT

I. In reaching this conclusion to rescind the settlement agreement, the Court of Appeals incorrectly

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21 This demerger resulted from a separate litigation challenging the merger of Koniag and Leisnoi.

22 Koniag did convey its interest in the subsurface estate to Stratman pursuant to the 1982 agreement.

23 Between the trial court and supreme court decisions, Stratman and Koniag again settled "all actions between or which could be between Omar Stratman and Koniag, Inc."

granted relief under Rule 60(b)(6) because the exclusive remedy for a settlement agreement mistakenly entered into is found in Rule 60(b)(1).[24]

Rule 60(b)(6) is a catchall exception which authorizes a court to grant relief from a final order for "any other reason justifying relief..." Fed. R. Civ. P. 60(b)(6). This Court has stated that relief under Rule 60(b)(6) is only available to parties in "extraordinary circumstances." *Ackermann v. United States*, 340 U.S. 193, 198-200, 71 S. Ct. 209, 211-13, 95 L. Ed. 207 (1950). Relief is not available from harm suffered as a result of free, calculated, deliberate choices. *Id.*

The Court of Appeals found that the parties entered the settlement agreement as a result of a mutual mistake of fact. App. B. The court further found that Stratman did not bear the risk of that mistake. *Id.* Thus, the court concluded that the settlement agreement was unenforceable and granted relief under Rule 60(b)(6) as an extraordinary circumstance. *Id.* This ruling conflicts with the exclusive provision for relief from mistake found in Rule 60(b)(1).

This Court should grant certiorari in its supervisory capacity over the courts of appeals to determine the construction of Rule 60(b)(6) with Rule 60(b)(1). Rule 60(b)(1) allows relief from judgments based upon "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). It is generally held that no relief is available under Rule 60(b)(6) if relief would be available under Rules 60(b)(1)-(5). *United States v. 119.67 Acres of Land*, 663 F.2d

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24 Of course, a party may also pursue an appropriate remedy in state court.

1328, 1331 (5th Cir. 1981). If a settlement agreement were mistakenly entered into relief could be sought under Rule 60(b)(1) and therefore not under 60(b)(6). *See 119.67 Acres of Land*, 663 F.2d at 1331. Although some courts have allowed relief under 60(b)(6) when a settlement agreement was totally unauthorized, *Id.*; *United States v. 32.40 Acres of Land*, 614. F.2d 108, 133-14 (6th Cir. 1980), or on the theory of changed circumstances, *see Stotts v. Memphis Fire Department*, 679 F.2d 541, 562 (6th Cir. 1982); *see also Equal Employment Opportunity Commission v. Safeway Stores, Inc.*, 611 F.2d 795, 800 (10th Cir. 1979),[25] an expansive application of these cases to settlement agreements based on a mutual mistake would erode the exclusivity of Rule 60(b)(1). Therefore, the Ninth Circuit erred by granting relief under Rule 60(b)(6) on the basis of a mutual mistake of fact.

Alternatively, even if a court may grant relief under Rule 60(b)(6) from a settlement agreement into which the parties mistakenly entered, a mutual mistake does not in itself constitute an extraordinary circumstance. A court must consider other facts and circumstances to determine whether a mutual mistake constitutes an extraordinary circumstance. Thus, for example, a court should consider the merits of the case and the potential for relief if the case were reopened. *See Stipelcovich v. Sand Dollar Marine, Inc.*, 805 F.2d 599, 605-06 (5th Cir. 1986) (considering potential relief available under Rule 60(b)(6)). The Ninth Circuit erred

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25 *But see Duran v. Elrod*, 713 F.2d 292, 296-97 (7th Cir. 1983) (noting that parties to a dispute made free, deliberate choice to settle dispute and bargained at arms length).

because it did not consider such facts or circumstances when granting relief to Stratman under Rule 60(b)(6).[26]

II. The Court of Appeals incorrectly granted relief under Rule 60(b)(6) because Stratman's inability to secure a favorable disposition in state court to enforce the settlement agreement is insufficient grounds to grant relief.

This Court should grant certiorari to resolve a conflict in the courts of appeals. In *Stipelcovich v. Sand Dollar Marine, Inc.*,[27] the Fifth Circuit held that a party is not entitled to relief from a settlement agreement under Rule 60(b)(6) when that party previously brought an action to enforce the settlement agreement. 805 F.2d 599, 605 (5th Cir. 1986). In *Stipelcovich*, the plaintiff sought to enforce a settlement agreement and obtained a judgment against the defendant. However, the defendant was insolvent, and the plaintiff was unable to collect. The plaintiff then brought a motion to reinstate the case. *Id.* at 602-03.

On appeal, the Fifth Circuit found that the plaintiff was not entitled to relief from judgment under Rule 60(b)(6). The court reasoned that when the defendant breached the settlement agreement, the plaintiff had two choices. Either she could bring an action to enforce the agreement, or she could make a Rule 60(b)(6) motion for relief from judgment. The court concluded that since she chose to seek enforcement of

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26 Stratman challenges Leisnoi's certification. If Leisnoi were, in fact, decertified as a result of this litigation, it is not clear what relief, if any, Stratman would be entitled to as a recreational interest holder.

27 This case is argued in Koniag's Petition for Reconsideration, January 17, 1995, at p. 11 n.1.

the settlement agreement, she was now precluded from seeking a reinstatement under Rule 60(b)(6). *Id.* at 605.

The Fifth Circuit's opinion conflicts with the Fourth Circuit's opinion in *Vincent v. Reynolds Memorial Hospital, Inc.*, 728 F.2d 250 (4th Cir. 1984). In that case, the plaintiff brought suit in state court seeking to enforce a settlement agreement with the defendant. *Id.* at 251. The state court held the agreement void as a matter of public policy. *Id.* The plaintiff then moved in the federal district court for relief from judgment under Rule 60(b)(6). *Id.* On appeal, the fourth circuit held that the invalidity of the settlement agreement entitled the plaintiff to relief. *Id.*[28]

Likewise, the Ninth Circuit's opinion in the present case conflicts with *Stipelcovich*. This Court should grant certiorari to resolve this conflict. In any case, this Court should adopt the principle which the Fifth Circuit followed in *Stipelcovich* that when a party pursues enforcement of a settlement agreement and receives an unfavorable disposition, this does not in itself constitute an "extraordinary circumstance" warranting relief from judgment under Rule 60(b)(6).

III. In *Leisnoi v. Stratman*, 835 P.2d 1202 (Alaska 1992), the Alaska Supreme Court found that

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28 The Fourth Circuit's opinion in *Vincent* is arguably distinguishable from the Fifth Circuit's opinion in *Stipelcovich*. In *Vincent*, the state court found that the settlement agreement was invalid. *Id.* In contrast, in *Stipelcovich*, the plaintiff obtained a valid judgment on the settlement agreement. In any case, it is unclear how these cases should be applied to the instant case. In Stratman's state court action to enforce the settlement agreement, the Alaska Supreme Court did not hold that the settlement agreement was invalid. It merely held that under the doctrine of *lis pendens* the agreement was not binding on Leisnoi. *Leisnoi, Inc. v. Stratman*, 835 P.2d 1202, 1208-11 (Alaska 1992).

Stratman and Burton had knowledge that the settlement agreement might be unenforceable against Leisnoi. In light of this finding, the Court of Appeals incorrectly granted relief under Rule 60(b)(6).

The doctrines of *res judicata* and collateral estoppel are firmly ingrained in American jurisprudence. *See Montana v. United States*, 440 U.S. 147, 153-54 (1979). By virtue of the Full Faith and Credit clause of the United States Constitution and 28 U.S.C. § 1738, federal courts are required to give *res judicata* effect to the judgments of state courts. *Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d 1524, 1529 (9th Cir. 1985); *see also Hoffman Construction Co. v. Active Erectors & Installers, Inc.*, 969 F.2d 796, 799 (9th Cir. 1992), *cert. denied* 113 S.Ct. 1258 (1993); *Robi v. Five Platters, Inc.*, 838 F.2d 318, 321-22 (9th Cir. 1988); *Hirst v. California*, 770 F.2d 776, 777-78 (9th Cir. 1985). They must apply the *res judicata* rules of a particular state to the judgments issued by that state. 28 U.S.C. § 1738; *Hoffman*, 969 F.2d at 799; *Robi*, 838 F.2d at 322.

In the instant case, the court of appeals held that its decision was not foreclosed by issue preclusion because the Alaska Supreme Court did not consider whether the settlement agreement was invalid. In so concluding, the court mischaracterized the term "issue." The doctrine of issue preclusion applies to both issues of fact and issues of law that were previously litigated in state court. *Americana Fabrics, Inc.*, 754 F.2d at 1529; *American Mannex Corp. v. Rozands*, 462 F.2d 688 (5th Cir. 1972), *cert. denied*, 409 U.S. 1040 (1972). The Alaska Supreme Court held:

> The trial court specifically found that Stratman and Burton were aware that a potential result of the Shurvaloff litigation was demerger and

> restoration of Leisnoi's rights to land. They are bound by that result.

Leisnoi, 835 P.2d at 1211. The Court of Appeals completely disregarded this finding of fact by the state court. Thus, the Court of Appeals failed to give full faith and credit to the Alaska Supreme Court's opinion in *Leisnoi, Inc. v. Stratman*, 835 P.2d 1202 (Alaska 1992) and improperly granted relief under Rule 60(b)(6).

Furthermore, Rule 60(b)(6) should not be construed to allow a party to collaterally attack a state court ruling on a settlement agreement. In the instant case, the Court of Appeals disregarded the state court's essential holding. The state court held that a person who acquires an interest in property that is subject to litigation is bound by the judgment in such litigation, at least where the person has notice of the litigation. *Id.* at 1209. It further held that a party is bound by the result of the litigation even if the result is unlikely. *Id.* at 1210-11. Thus, the court concluded that Stratman and Burton were bound by the demerger litigation and could not enforce the settlement agreement against Leisnoi. *Id.* at 1210. The Court of Appeal's decision to rescind the settlement agreement relieves Stratman and Burton of the state court's ruling that they were bound by the demerger litigation. To allow Stratman and Burton to collaterally attack the state court's ruling exceeds the purpose of Rule 60(b)(6) as an extraordinary remedy and conflicts with the principles of full faith and credit.

IV. In the Court of Appeal's 1981 ruling, the court erroneously held that Stratman and Burton were entitled to actual notice. The due process clause of the Fifth Amendment does not require that actual notice of village eligibility proceedings be given to federal leaseholders on land subject to selection under ANCSA

where all such leaseholds constitute valid existing rights which are statutorily protected regardless of the outcome of the proceedings.

The due process clause imposes an obligation on the federal government to provide certain procedural protection prior to depriving any person of life, liberty, or property. That protection is generally said to consist of notice and a hearing appropriate to the nature of the case. *See Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950). The district court expressly held that section 14(g) of ANCSA eliminated any potential injury to Stratman and Burton's property interests. App. F, p. 34a. Therefore, Stratman and Burton were not deprived of a property interest for due process purposes. Nevertheless, the Court of Appeals concluded that Stratman and Burton were entitled to actual notice. In so doing, the Court of Appeals bypassed the critical threshold issue of whether the due process clause was implicated at all. It thereby substantially expanded the scope of the due process clause.

In the *Mullane* line of cases, this Court has considered the adequacy of various forms of notice with regard to specific governmental actions. *See Covelo Indian Community v. Federal Energy Regulatory Commission*, 895 F.2d 581, 587 (9th Cir. 1990) (discussing *Mullane* and its progeny). For example, in *Schroeder v. City of New York*, the City of New York attempted to condemn real property of an absentee owner after providing notice by publication. 371 U.S. 208, 208-11 (1962). This Court held that *Mullane* required the city to provide personal notice. *Id.* at 213. In *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 77 L Ed. 2d 180 (1983), this Court articulated somewhat

of a bright line rule regarding the sufficiency of notice by publication. This Court stated:

> Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.

462 U.S. at 800. Similarly, in *Tulsa Collection Services v. Pope*, this Court held that a creditor of a decedent's estate was entitled to actual notice of probate proceedings because such proceedings could extinguish a creditor's claim. 485 U.S. 478, 578-79 (1988).[29] However, these cases did not address the issue of what constitutes a deprivation of property implicating the due process clause. *See Federal Deposit Insurance Corp. v. City of New Iberia*, 921 F.2d 610, 614 (5th Cir. 1991); *Covelo Indian Community v. Federal Energy Regulatory Commission*, 895 F.2d 581, 587 & n.2 (9th Cir. 1990). This Court should now address that issue.

Several circuit courts of appeal have spoken to the issue. For example, in *Fusco v. State of Connecticut*, the Second Circuit addressed the issue of whether a governmental action causing a decline in property values was a "deprivation" of property implicating the due process clause. 815 F.2d 201 (2nd Cir. 1987). In *Fusco*,

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29 The Court also briefly commented on the issue of what constitutes a deprivation of property rights. The Court noted that "[i]t is not necessary for a proceeding to directly adjudicate the merits of a claim in order to 'adversely affect' that interest." *Id.* at 577. However, like *Mennonite*, this case involved a clear deprivation of a property interest. *See id.; see also Covello Indian Community v. Federal Energy Regulatory Commission*, 895 F.2d 581, 587 n.2 (9th Cir. 1990).

landowners brought a civil rights action under 42 U.S.C. § 1983, asserting that certain zoning regulations had deprived them of property without due process of law. *Id.* at 204. On appeal, the Second Circuit suggested a three part analysis to determine whether the zoning regulations had violated the landowners due process rights. *Id.* at 205. The court inquired:

> (a) whether a property right has been identified; (b) whether governmental action with respect to that property rights amounts to a deprivation; and (c) whether the deprivation, if one be found was visited upon the plaintiff without due process of law.

Id. (citing *Parratt v. Taylor*, 451 U.S. 527, 536-37 (1981)). Following this analysis, the court held that a decline in property values was not a deprivation of property for due process purposes. *Id.* at 206.

The Eleventh Circuit recently adopted a similar analysis in *Zipperer v. City of Fort Myers*, 41 F.3d 619 (11th Cir. 1995). In *Zipperer*, a mortgagee challenged the lien prioritization of special assessments leveled by the city on mortgaged land. *Id.* at 622. The mortgagee asserted that the special assessments and their lien prioritization impaired the value of his property interest without providing notice and a hearing and thereby violated his due process rights. *Id.* On appeal, the eleventh circuit followed a three part analysis:

> (1) whether [the mortgagee] had a constitutionally protected property interest; (2) whether he was deprived of that interest; and (3) if he was deprived of a constitutionally protected property interest, whether the [government] failed to use

> constitutionally sufficient procedures before that deprivation occurred.

Id. at 623 (citing *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 460 (1989); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982)). The court held that the imposition and prioritization of special assessment liens on the mortgaged land did not deprive the mortgagee of his property interest. *Id.* at 625. The court distinguished the Supreme Court's decision in *Mennonite*. *Id.* at 624. The court reasoned that the special assessment liens did not "immediately and drastically diminish [the mortgagee's] interests in a manner that would implicate a *Mennonite* due process deprivation." *Id.* (citing *Federal Deposit Insurance Corp. v. City of New Iberia*, 921 F.2d 610 (5th Cir. 1991)).

The Fifth Circuit also distinguished *Mennonite* in a case involving facts similar to *Zipperer*. *Federal Deposit Insurance Corp. v. City of New Iberia*, 921 F.2d (5th Cir. 1991). The court reasoned:

> Although *Mennonite* espoused a far-reaching requirement of notice to property owners adversely affected by state actions, the case did not analyze, beyond its straightforward facts, what constitutes a "deprivation" of property.

Id. at 614. The court concluded that a deprivation of property did not occur. *Id.* at 616.

In *Covelo Indian Community v. Federal Energy Regulatory Commission*, 895 F.2d 581 (9th Cir. 1990), the Ninth Circuit discussed notice requirements in the context of the Federal Energy Regulatory Commission's (FERC's) decision to relicense a hydroelectric power plant. The Covelo Indian Community contended that it

was entitled to actual notice of the FERC proceedings because its statutory fishing rights could be affected by the relicensing of the plant. *See id.* at 587. The Community contended that under the *Mullane* line of cases, notice by publication is insufficient "when the names and addresses of interested parties are reasonably ascertainable." *Id.* The Ninth Circuit recognized that the Community had a property right for purposes of due process analysis. *Id.* Nevertheless, the court concluded that the Community was not entitled to actual notice because any adverse affect on the Community's property interest was speculative. *Id.* at 587-88. The court reasoned that the *Mullane* line of cases did not apply because those cases involved "imminent government action directly affecting parties' property rights." *Id.* at 587.

The Ninth Circuit came to a similar conclusion in *Conner v. Burford* 836 F.2d 1521 (9th Cir. 1988) and 848 F.2d 1441 (9th Cir. 1988). In that case, holders of federal leases challenged an injunction prohibiting the federal government from allowing any activity to occur on any of the leases until they had complied with NEPA and ESA. 836 F.2d at 1541. The lessees asserted that they were denied Fifth Amendment due process because they were not given notice and an opportunity to be heard. *Id.* at 1541 n.51. The court held that "[b]ecause the lessees' property interests were not adjudicated in this litigation, their right to notice and an opportunity to be heard cannot be invoked." *Id.* (citing *Sierra Club v. Watt*).[30] The court noted that although the development

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30 In *Sierra Club v. Watt*, 608 F. Supp. 305 (D.C. Cal. 1985), the district court discussed the due process requirement of notice in the context of the Federal Land Policy Management Act (FLPMA). In that case, the plaintiffs brought a suit challenging an order by then Secretary of the Interior Watt under FLPMA. *Id.* at 313. Mountain States Legal Foundation (MSLF) moved to intervene on behalf of owners of mineral interests on lands affected by the litigation. *Id.* at 318. MSLF contended

of the leases could be delayed by the injunction, the effect on the leases was minimal. *See id.* at 1542.

Thus, the Ninth Circuit's decision in *Stratman* is in conflict with these other opinions from the courts of appeals, including those of the Ninth Circuit. The Supreme Court should grant certiorari to determine how the *Mullane* line of cases applies to cases where there is no clear deprivation of property. As Chief Justice Rehnquist suggested in *Tulsa Collection Service v. Pope*, the inquiry should focus on the effect of the government action on the property right in question. 485 U.S. 478, 494 (1988) (Rehnquist, C.J., dissenting). The Supreme Court should also articulate a standard for determining whether a deprivation of property has occurred. As the preceding cases indicate, the issue has a broad affect on land management and regulation by states, municipalities, and the federal government.

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that due process entitled mineral interest holders notice and an opportunity to intervene. *Id.* at 325.

The district court rejected MSLF's contentions. The court recognized that the mineral interest owners held "property rights which, if threatened, would trigger Fifth Amendment due process protection." *Id.* at 325. However, the court noted that FLPMA provided that "[a]ll actions by the Secretary concerned under this Act shall be subject to valid existing rights." *Id.* at 327 (quoting 43 U.S.C. § 1701 n. (h)). The court therefore concluded that the mineral interest owners could not suffer a deprivation of rights implicating the due process clause. *Id.* The court summarized its reasoning:

Put another way, either the interest is a valid existing right protected by the property provision of the due process clause and unaffected by this litigation or it is not, and thus is not subject to due process protection.

Id. This was essentially the same argument made by the federal defendant in its Memorandum in Support of Motion for Relief from Judgment of January 30, 1979. App. J, pp. 33a-34a. Oddly, however, the court distinguished *Stratman v. Watt* in a footnote. 608 F. Supp. at 327 n.39.

V. Stratman and Burton were not entitled to actual notice of the village eligibility proceedings because the regulations provide holders of property interests actual notice and an opportunity to appear at a meaningful time to protect their property rights.

The Court of Appeals purported to address the issue in a footnote. The opinion reads:

> Defendants argue that because the statute provides that the allotment of land to the Native village shall be subject to any valid existing rights, 43 U.S.C. § 1613(g), there need be no notice. We disagree, for those with leasehold interests should receive notice in order to protect the rights intended to be preserved by the statute.

App. A, p. 9a n.4. The Court of Appeals failed to recognized that actual notice is required for persons claiming property interests at the stage of the administrative proceedings in which those rights may be implicated.

Under ANCSA, the settlement process consists of a number of discrete steps. First, the Secretary must determine that the village is eligible for benefits. 43 U.S.C. § 1610(b) (1988). A village is eligible if it meets certain specified criteria. *Id.* Notice of village eligibility proceedings is provided by publication.[31] 43 C.F.R. § 2651.2(a)(2), (8) (1994). Interested parties may participate in these proceedings.

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31 In addition, notice is mailed to all villages within the region and all regions in the state of Alaska. 43 C.F.R. § 2651.2(a)(2), (8).

Second, if the Secretary determines that a village is eligible, and an appropriate village corporation is formed, then the Secretary then reviews the village's land selections to determine their conformity with the statutory limitations. 43 U.S.C. §§ 1611(a) and 1621(l) (1988); *see* 43 C.F.R. § 2651.4 (1994). A decision to convey is prepared which specifies the valid existing rights which are of record either on federal or state land records. The regulations require that "in order to give actual notice [of the decision, it must] be served on all known parties of record who claim to have a property interest or other valid existing right in land affected by such decision." 43 C.F.R. § 2650.7(d). This regulation was promulgated in order to:

> provide notice to any adverse claimant...giving him an opportunity to come forward and assert a claim, thus providing more certainty of title to be conveyed and providing due process for all affected persons.

41 Fed. Reg. 14735 (Apr. 7, 1976). Because Stratman and Burton were entitled to actual notice at such time as the federal act which could affect their property rights would occur, they were not deprived of due process by virtue of the fact that they did not receive actual notice of the decision on Leisnoi's eligibility.[32]

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32 The Ninth Circuit's opinion in *Stratman* may also affect the management of public lands under statutes such as the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-578, 90 Stat. 2744 (1976). Under FLPMA, the Secretary of the Interior is required to devise and maintain land use plans which provide for the use of public lands. 43 U.S.C. § 1712(a) (1988). Federal regulations provide for public notice and an opportunity for participation at several stages of the planning process. 43 C.F.R. § 1610.2 (1994).

Upon starting the preparation of a land use plan, the Secretary is required to publish notice in the Federal Register and appropriate media. *Id.* at § 1601.2(c). In addition, the Secretary is required to maintain a list of persons known to be interested in or affected by a land use plan. *Id.* at §

VI. Stratman and Burton do not have a right to actual notice based on potential economic injury because (1) Stratman and Burton's economic claims were dismissed by the district court, and (2) Stratman and Burton have never been the real parties in interest to assert such injury.

The Court of Appeals agreed with the district court's conclusion that the recreational users were barred from bringing suit because of their failure to exhaust administrative remedies. App. A, p. 5a. Nevertheless, the Court of Appeals found that there was a strong argument for allowing Stratman and Burton to proceed on the basis of their recreational interests because they held economic interests at time of the administrative proceedings. App. A, p. 8a. The Supreme Court has never addressed the issue of whether a person may invoke due process protection with regard to claims which have been dismissed. However, the court of appeal's decision in *Stratman* would appear to conflict with the purpose of the due process clause to protect against deprivations of property. If a court determines that a deprivation of certain interests will not occur, then due process issues become moot with respect to those interests.

Furthermore, the Court of Appeal's conclusion ignores the district court's finding that the grazing leases which gave rise to Stratman and Burton's alleged economic injury were held by Northland Ranches, Inc., and Kodiak Cattle Co.[33] App. D, p. 27a, n.1. Stratman

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1610.2(d). The Secretary must notify those persons of public participation activities. *Id.*

33 The district court noted that the complaint appeared to be in violation of Fed. R. Civ. P. 17(a). App. D, p. 27a n.1.

and Burton were minority shareholders in these corporations. The slaughterhouse was owned by the Kodiak Livestock Cooperative, of which Stratman and Burton were members. Amended Complaint, ¶ VII. The Court of Appeals committed error by allowing Stratman and Burton to bootstrap their recreational claims to the economic claims of the corporations in which they were shareholders. There is no basis in law for allowing Stratman and Burton to invoke the due process rights of these corporations.

VII. Stratman and Burton do not have standing because their recreational interests are not within the zone of interests protected by ANCSA.

The Court of Appeals held that the recreational interests asserted by Stratman and Burton were within the zone of interests protected by the statute. App. A, p. 7a. The court reasoned:

> The regulations do not restrict the nature of protests which may be filed but rather provide that "any interested party" may protest the village certification. 43 C.F.R. § 2651.2(a)(9). The Act itself indicates that Congress was well aware of the recreational interests of users of public land, and specifically provided for retention of public access easements in the lands selected by Native villages in order to preserve and protect recreational interests in the remaining federal lands. 43 U.S.C. § 1616(b).

Id. The court's analysis is erroneous in two fundamental respects. First, the court assumed that administrative standing necessarily confers judicial standing. However,

the fact that a person is a party to an administrative proceeding does not mean that the person should be allowed to seek judicial review. The person must still satisfy judicial standing requirements. *Chemehuevi Tribe of Indians v. Federal Power Commission*, 489 F.2d 1207, 1212 n.12 (D.C. Cir. 1973); *City of St. Louis v. Department of Transportation*, 936 F.2d 1528, 1532-33 (8th Cir. 1991); *see California Association of the Physically Handicapped v. Federal Communications Commission*, 778 F.2d 823, 826 n.8 (D.C. Cir. 1985). Thus, a plaintiff must establish that the injury complained of falls within the "zone of interests" protected by the statute. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 882-83, 111 L. Ed. 2d 695, 712-13, 110 S. Ct. 3177 (1990). The fact that regulations conferring administrative standing are unrestrictive does not relieve a plaintiff of this burden.

Second, the court misconstrued the purpose of ANCSA. The court reasoned that Congress' awareness of recreational interests was sufficient to confer standing on all holders of recreational interests which could be affected by ANCSA. This exceeds the purpose of ANCSA. The purpose of ANCSA is to provide a "fair and just settlement of all claims by Natives and Native groups of Alaska." 43 U.S.C. § 1601(a) (1988). The Act further provides that "the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property..." *Id.* at § 1601(b).[34] Thus, ANCSA stands in stark contrast to

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34 *See also* Letter from Secretary of the Interior, Rogers C.B. Morton to the House of Representatives, *reprinted in* U.S. Code Cong. & Admin. News 2216 (1971) (stating that "In the final analysis, legislation on this subject represents an agreement among three parties--the Alaska natives, the State of Alaska and the United States Government.")

other land management and environmental acts which are enacted by Congress for the specific purpose of protecting and conserving natural resources. *See, e.g., United States v. SCRAP*, 412 U.S. 669, 679 (1973) ("The main thrust of SCRAP's complaint was that the Commission's decisions...failed to include a detailed environmental impact statement as required by...the National Environmental Policy Act of 1969"); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 886, 111 L. Ed. 2d 695, 715, 110 S. Ct. 3177 (1990) (finding that "'recreational use and aesthetic enjoyment' are among the *sorts* of interests [FLPMA and NEPA] were specifically designed to protect"); *No GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380 (9th Cir. 1988) (environmental case brought under NEPA); *Friends of the Earth v. Consolidated Rail Corp.*, 768 F.2d 57, 60-61 (2nd Cir. 1985) (environmental suit brought under Federal Water Pollution Control Act); *United States v. Metropolitan St. Louis Sewer District*, 883 F.2d 54 (8th Cir. 1989) (environmental suit brought under Federal Water Pollution Control Act).

The Court of Appeals correctly noted that Congress did make some accommodation for recreational interests. Under former section 1616(b), the Joint Federal State Land use Planning Commission for Alaska[35] was authorized to identify public easements across selected lands for recreational and other purposes. Pub. L. No. 92-203, § 17(b), 85 Stat. 688 (1971). However, the court severely stretched the prudential limitations of standing by allowing Stratman and Burton to challenge Leisnoi's eligibility by virtue of this legislative accommodation. Although Congress recognized recreational interests under ANCSA, Congress specifically provided other non-judicial

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35 The commission has been abolished. However, the Bureau of Land Management still reserves public easements.

procedures for protecting those interests. For example, the Planning Commission was directed to receive and review statements from interested organizations and individuals when identifying public easements. *Id.* In addition, the regulations provide for public participation in the land selection process. These procedures adequately protect whatever recreational interests may be at stake. Therefore, Stratman and Burton do not fall within the "zone of interests" protected by ANCSA for standing purposes.

CONCLUSION

For these reasons, Petitioner respectfully requests that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit in *Stratman v. Watt* and *Stratman v. Babbitt*.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-4480

OMAR STRATMAN, et al.,
Plaintiffs-Appellants,

v.

JAMES G. WATT, Secretary of the Interior, et al.,
Defendants-Appellees.

OPINION

Argued and Submitted September 11, 1980.

Decided September 8, 1981.

Rehearing Denied November 27, 1981.

Roger E. Henderson, Anchorage, Alaska; Frederick L. Miller, Duncan, Weinberg & Miller, Washington, D.C., argued, for plaintiffs-appellants; Roger E. Henderson, Houston & Henderson, Anchorage, Alaska, on brief.

Peter Steenland, Washington, D.C., argued, for defendants-appellees; Dan A. Hensley, Anchorage, Alaska, on brief.

Appeal from the United States District court for the District of Alaska.

Before WALLACE, HUG and SCHROEDER, Circuit Judges.

SCHROEDER, Circuit Judge:

This is an action by various individuals to enjoin the granting of land patents to a Native corporation pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.* Plaintiffs seek to demonstrate that the village corporation, Leisnoi, Inc. (Leisnoi), comprising the village of Woody Island, was not qualified as a Native village under the requirements of 43 U.S.C. § 1610(b)(3).[1] Defendants include the Secretary of the Interior and Leisnoi. A series of district court rulings resulted in the dismissal of all the plaintiffs' claims, and we partially remand.

At the time suit was filed, these plaintiffs could have been grouped into two categories. The first group of plaintiffs were individuals who occasionally used the land subject to patent for recreational purposes. The other plaintiffs, Stratman and Burton, held long-term federal grazing leases on land within the area subject to patent, and were also recreational users. We affirm the district court's dismissal of the claims of the first category of plaintiffs, and reverse and remand the dismissal of the remaining recreational claims of Stratman and Burton.

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1 The action originally challenged two other Native villages, but those claims were separately litigated in another action, *see Koniag, Inc. v. Kleppe*, 405 F. Supp. 1360 (D.D.C. 1975), *aff'd in part and rev'd in part*, 580 F.2d 601 (D.C. Cir.), *cert. denied*, 439 U.S. 1052, 99 S.Ct. 733, 58 L.Ed.2d 712 (1978); those villages have subsequently been found by the Secretary to be ineligible.

The Alaska Native Claims Settlement Act (ANCSA), enacted in 1971, is intended to settle all aboriginal land claims by Natives and Native groups of Alaska. 43 U.S.C. § 1601; *Doyon, Ltd. v. Bristol Bay Native Corp.*, 569 F.2d 491, 493 (9th Cir.), *cert. denied*, 439 U.S. 954, 99 S.Ct. 352, 58 L.Ed.2d 345 (1978). ANCSA provides for accomplishment of that settlement through distribution of 40 million acres of land and payment of $962,500,000 to Native villages and regional corporations established pursuant to the Act's provisions. The Act lists many Native villages which are eligible for benefits, provided the Secretary determines they meet specified qualifications. 43 U.S.C. § 1610(b)(1) & (2). ANCSA also provides that villages other than villages specifically enumerated in the Act can qualify as recipient Native villages under certain conditions. 43 U.S.C. § 1610(b)(3).[2] Regulations promulgated by the Secretary of Interior provide for particular kinds of notice and a hearing to determine the validity of each unlisted village's application. 43 C.F.R. § 2651.2(a)(8)-(10).

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2 43 U.S.C. § 1610(b)(3) provides:

> Native villages . . . shall be eligible for land and benefits under this Act . . . if the Secretary . . . determines that–
>
> (A) twenty-five or more Natives were residents of an established village on the 1970 census enumeration date as shown by the census of other evidence satisfactory to the secretary, who shall make findings of fact in each instance; and
>
> (B) the village is not of a modern and urban character, and a majority of the residents are Natives.

Woody Island is not listed in the Act as an eligible Native village. Application was made, however, for Woody Island to be declared an eligible village. After an investigation in 1973, Woody Island was found eligible to form a village corporation and determination of that eligibility was published in the Federal Register and several Alaska newspapers in accordance with Department of Interior regulations. None of the plaintiffs received actual notice of the Woody Island village application, however, and none filed objections or participated in any hearings held on the application, which was approved by the Secretary of Interior on March 18, 1975.

After learning of Woody Island's certification and the subsequent incorporation of Leisnoi to select lands for patent, plaintiffs filed this action pursuant to 28 U.S.C. § 1331 in July 1976, claiming that the government's investigation of the application, as required by 43 U.S.C. § 1610(b)(3) and 43 C.F.R. §§ 2651.2(a)(8) & 2651.2(b), had been insufficient and that the village did not qualify as a Native village. In a published opinion, the district court initially dismissed the claims of the recreational users, other than Stratman and Burton, for their failure to exhaust administrative remedies. However it permitted Stratman and Burton, because they had property interests in the land, to amend their complaint and to proceed, notwithstanding their failure to participate in any administrative proceedings. The court determined Stratman's and Burton's record interests entitled them to actual, rather than constructive notice of the certification application when administrative proceedings were pending. *Kodiak-Aleutian Chapter of Alaska conservation Soc'y v. Kleppe,* 423 F. Supp. 544 (D.Alaska 1976).

[1] At that point, faced with a full-scale trial of the Stratman-Burton claims, Leisnoi quitclaimed any interest in all land subject to Stratman's and Burton's leaseholds, thus mooting any claims based upon economic injury. Upon application of the defendants, the district court withdrew its prior ruling in favor of Stratman and Burton and dismissed their claims on the ground that there no longer existed any "case or controversy" within the meaning of article III of the United States Constitution.[3] The district court, significantly in our view, did not expressly consider the claims of Stratman and Burton as recreational users, apparently agreeing with the defendants that the quitclaim deed eliminated Stratman's and Burton's standing to challenge the certification.

Plaintiffs in this appeal ask us to review both the dismissal of the Stratman-Burton claims for lack of a case or controversy and the dismissal of the recreational users' claims for failure to exhaust administrative remedies.

With respect to Stratman and Burton, the issue of whether their claims were properly dismissed following the relinquishment by Leisnoi of any claim to the land in which they had economic interests. Its ruling was based upon the defendants' argument that

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3 Stratman and Burton argue that their economic claims are not moot because other land selections by Leisnoi may threaten harm to their future economic interests in the area. We agree with the district court's ruling that any injury to these generalized economic interests is too speculative to create a case or controversy under article III. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S.Ct. 1601, 1607-08, 60 L.Ed.2d 66 (1979); *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). *See also Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 42-44, 96 S.Ct. 1917, 1926-27, 48 L.Ed. 2d 450 (1976).

the plaintiffs lacked standing to pursue any claim of damage other than damage to economic interests, and thus could not pursue any remaining claim based on recreational interests.

[2] A threshold question for all the plaintiffs is therefore one of standing. In determining standing, we must consider both constitutional and prudential concerns. To satisfy the constitutional requirement that a "case or controversy" had been made out, the plaintiff must allege that he has suffered injury resulting from the defendant's allegedly illegal action. *Warth v. Seldin*, 422 U.S. 490, 498-99, 95 S.Ct. 2197, 2204-05, 45 L.Ed.2d 343 (1975). We have concluded that to satisfy this requirement "the plaintiffs must have alleged (a) a particularized injury (b) concretely and demonstrably resulting from defendant's action (c) which injury will be redressed by the remedy sought." *Bowker v. Morton*, 541 F.2d 1347, 1349 (9th Cir. 1976) (footnote omitted). *See also Sierra Club v. Andrus*, 610 F.2d 581, 592 (9th Cir. 1979).

[3] In dealing with standing to assert recreational interests, the Supreme Court in *Sierra Club v. Morton*, 405 U.S. 727, 734, 92 S.Ct. 1361, 1366, 31 L.Ed.2d 636 (1972) rejected the argument that only economic interests could provide standing, pointing out that "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society . . . ." The plaintiffs allege they use the land subject to patent for a multitude of recreational purposes, including hunting, camping, picnicking and photography. This injury is sufficiently particularized; it is clear that the injury results from the defendants' action in removing the land from the public domain; the injury will be redressed by the enjoining of the defendants' removal of the land from the public domain. Thus, we conclude that the

plaintiffs have satisfied the constitutional requirements of standing.

Plaintiffs have also satisfied our prudential standing concerns. Plaintiffs' claims are not merely claims of generalized import, but seek to vindicate individual rights. In Addition, plaintiffs are raising their own legal interests, rather than the interests of third parties. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S.Ct. 1601, 1607-08, 60 L.Ed.2d 66 (1979).

Finally, we are satisfied that plaintiffs' claim is within the zone of interests to be protected by the statute pursuant to which the claim arises. *Id.* at 100 n.6, 99 S.Ct. 1607-08 n.6, *citing Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1969). In considering whether that claim is within this zone of interests, we look to both the statute and the regulations promulgated under it. *See* B. Mezines, J. Stein & J. Gruff, 5 *Administrative Law* § 50.03 at 50-29 & 30 (1981) (look to statute to determine purpose and class to be protected); B. Schwartz, *Administrative Law* § 153 at 455 (1976). The regulations do not restrict the nature of protests which may be filed but rather provide that "any interested Party" may protest the village certification. 43 C.F.R. § 2651.2(a)(9). The Act itself indicates that Congress was well aware of the recreational interests of users of public land, and specifically provided for retention of public access easements in the lands selected by Native villages in order to preserve and protect recreational interests in the remaining federal lands. 43 U.S.C. § 1616(b). We are thus persuaded that recreational interests are within the zone protected by the statute and we reject the defendants' argument that the recreational claims should have been dismissed for lack of standing.

[4] We now turn to the district court's original determination that those plaintiffs (other than Stratman and Burton) whose interests were never more than recreational should have exhausted administrative remedies. The plaintiffs argue against imposition of such a requirement on the ground that they did not have actual notice of the village's application and thus could not have utilized administrative remedies. There are, however, a vast number of occasional users of this land and actual notice to all would have been impossible. Notice was provided by publication in the Federal Register and several Alaska newspapers. The district court correctly held that neither the government nor the village was required to give actual notice to all potential recreational users, and that the publication and other notice requirements set forth in the regulations, 43 C.F.R. § 2651.2(a)(8), did not deny due process to those whose only connection with the land was, at the time of published notice, simply that of recreational users. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317, 70 S.Ct. 652, 658, 94 L.Ed. 865 (1950); *North Am. Pharmacal, Inc. v. HEW*, 491 F.2d 546, 551-52 (8th Cir. 1973); 44 U.S.C. § 1508. Thus, while those with recreational interests have standing to challenge the agency action in question, they may not be relieved of the prerequisite of exhaustion of administrative remedies by virtue of lack of actual notice.

[5] Stratman and Burton, however, were not merely recreational users at the time of Woody Island's application. They had record interests in land which was subject to allotment and thus were potentially affected by the village certification at the time of the application. Given the ease with which such record interests could have been ascertained, we agree with the district court's original determination, 423 F. Supp.

at 547, that Stratman and Burton were entitled to actual notice of the proposed certification. *Schroeder v. City of New York*, 371 U.S. 208, 212-13, 83 S.Ct. 279, 282, 9 L.Ed.2d 255 (1962); *Walker v. City of Hutchison*, 352 U.S. 112, 116, 77 S.Ct. 200, 202, 1 L.Ed.2d 178 (1956); *Mullane v. Central Hanover Bank & Trust Co.*, *supra*, 339 U.S. at 314, 70 S.Ct. at 657. Since they did not receive such notice, they should not be barred by exhaustion requirements.[4] *Wills v. United States*, 384 F.2d 943 (9th Cir. 1967), *cert. denied*, 392 U.S. 908, 88 S.Ct. 2052, 20 L.Ed.2d 1366 (1968).

The difficult remaining question is the effect to be given Leisnoi's subsequent disclaimer of any interest in the property encompassed by Stratman's and Burton's leases. Had such a disclaimer occurred prior to the application for certification, their interests probably would not have differed form those of any recreational user. However, the disclaimer did not occur until after the administrative proceedings had concluded and hence after the opportunity to participate in the original determination had been lost. Since the administrative proceedings were not limited to the consideration of economic interests, a strong argument can be made that parties like Stratman and Burton, who were originally entitled to notice of the application and an opportunity to participate in the administrative hearings, and who were not given such notice, should be permitted to air all of their grievances, not merely economic grievances, in a judicial forum.

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[4] Defendants argue that because the statute provides that the allotment of land to the Native village shall be subject to any valid existing rights, 43 U.S.C. § 1613(g), there need be no notice. We disagree, for those with leasehold interests should receive notice in order to protect the rights intended to be preserved by the statute.

[6, 7] Application of the doctrine of exhaustion of administrative remedies to the Stratman-Burton claims requires a balancing of factors, however. Judicially developed exhaustion requirements, which are necessarily susceptible to judicial refinement and modification, must be tailored to fit the peculiarities of an administrative system and the particular facts of each case. *Montgomery v. Rumsfeld*, 572 F.2d 250, 253 (9th Cir. 1978). A balancing analysis considers "both the interests of the agency in applying its expertise, correcting its own errors, making a proper record, enjoying appropriate independence of decision and maintaining an administrative process free from deliberate flouting, and the interests of private parties in finding adequate redress for their grievances." *Id.* *See also McKart v. United States*, 395 U.S. 185, 194-95, 89 S.Ct. 1657, 1662-63, 23 L.Ed.2d 194 (1969); *SEC v. G. C. George Sec., Inc.*, 637 F.2d 685, 688 n.4 (9th Cir. 1981). In this case, Stratman and Burton, who were originally entitled to notice and an opportunity to participate in the administrative proceedings, did not deliberately flout or seek a premature interruption of the administrative process. *Contrast McGee v. United States*, 402 U.S. 479, 488, 91 S.Ct. 1565, 1571, 29 L.Ed.2d 47 (1971) (deliberately side-stepped administrative proceedings); *Pattillo v. Schlesinger*, 625 F.2d 262, 266 (9th Cir. 1980) (Complete relief available through existing administrative procedures). The agency, on the other hand, undoubtedly had an interest and expertise in this basically factual dispute.

The district court, in finally disposing of this case on jurisdictional grounds, did not consider Stratman's and Burton's remaining recreational interests and therefore did not weigh the various alternatives which might be open to it in this regard. The judicial requirement of exhaustion of

administrative remedies is not mechanically applied and we believe the question should be considered initially by the district court; we remand for such consideration. *Sec. v. G.C. George Sec., Inc., supra,* 637 F.2d at 688 n.3; *Montgomery v. Rumsfeld, supra,* 572 F.2d at 254.

A remand is particularly appropriate here because the government, after the judgment was entered, represented to this Court that it intended to conduct further administrative inquiries into the qualifications of Woody Island. If such proceedings have occurred, plaintiffs may well have been given some opportunity to present administratively the matters which they sought to litigate in a judicial forum.[5] Any pending or intervening administrative action should be taken into account by the district court in determining what, if any, further judicial proceedings in connection with Stratman's and Burton's claims are warranted.

Affirmed in part; reversed and remanded in part.

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5 Although plaintiffs' brief contains extensive discussion of claimed irregularities in the application, neither this Court nor the district court has considered the merits of their challenges. Defendants' motion to strike that portion of plaintiffs' brief is denied as moot.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 93-36006

FILED
December 5, 1994

Omar Stratman,

Plaintiff,

v.

Bruce Babbitt, Secretary of the Interior, Leisnoi Inc., Koniag, Inc.,

Defendants-Appellees.

MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
James A. von der Heydt, District Judge, Presiding

Argued and Submitted October 31, 1994
Seattle, Washington

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: WRIGHT, BEEZER and FERNANDEZ, Circuit Judges

Omar Stratman appeals the district court's denial of his motion to vacate a judgment of dismissal that had been entered upon Stratman's motion, brought in accordance with the terms of a settlement agreement signed by Stratman and Koniag, Inc. The dismissal was as to all defendants. Stratman also appeals the court's declination to alter that ruling after granting his motion for reconsideration. We reverse.

We will not reverse a district court's refusal of relief under Federal Rule of Civil Procedure 60(b)(6) in the absence of an abuse of discretion. United States v. RG&B Contractors, Inc., 21 F.3d 952, 954 (9th Cir. 1994). Moreover, as we have said, "[r]elief under Rule 60(b)(6) is extraordinary, especially where the judgment was rendered by consent." Washington v. Penwell, 700 F.2d 570, 574 (9th Cir. 1983); see also Jeff D. v. Andrus, 899 F.2d 753, 759 (9th Cir. 1989) (resolution of litigation through settlement is favored). Even so, when an agreement fails of its purpose in its entirety, that does raise an extraordinary circumstance. Cf. Keeling v. Sheet Metal Workers Int'l Ass'n, Local Union 162, 937 F.2d 408, 410 (9th Cir. 1991) (where party repudiated a settlement, the situation was extraordinary and setting aside dismissal was proper). This is just such a case.

Here, there was, as it turned out, a basic defect in the very inception and at the very core of the settlement agreement upon which the dismissal of this case was based. Unless Stratman made a deliberate choice to accept the risk of that defect, his agreement should not bind him and the dismissal of this action

should be set aside. When the district court failed to set aside the dismissal it did, in this extraordinary circumstance, abuse its discretion. Thus, we will first refer to the effect that the defect had upon the settlement agreement itself and will then discuss the deliberate choice issue.

A. The Agreement

The interpretation of the settlement agreement is subject to Alaska state law. Jeff D., 899 F.2d at 759. In Alaska, settlement agreements are interpreted according to the general principles of contract law. See Hayes v. Xerox Corp., 718 P.2d 929, 937 (Alaska 1986). Even a contract for a quitclaim deed can be rescinded if the parties who negotiated for the deed were operating under a material mutual mistake of fact. See Mantanuska Valley Bank v. Abernathy, 445 P.2d 235, 237-38 (Alaska 1968). A material mutual mistake of fact occurs when "'there was a mistake of both parties at the time of contracting as to a basic assumption on which the contract was made; the mistake had a material effect on the agreed exchange of performances, and the party seeking relief did not bear the risk of the mistake.'" Alaska Div. of Agric. v. Carpenter, 869 P.2d 1181, 1183 (Alaska 1994) (citation omitted).

It cannot be gainsaid that the first two requirements are met. It is clear that the settlement agreement negotiated by Koniag and Stratman contemplated that the surface rights to the subject land would be included, and that this was the contracting parties' intention. Koniag and Stratman believed at the time they entered into the settlement agreement that Leisnoi did not exist and that Koniag held all of the former Leisnoi's interests. If, in practical effect, Leisnoi did exist, both parties were operating under a material mistake of fact that went to the heart of the

contract they signed. Both parties believed that Koniag had the authority to represent Leisnoi's interest because Leisnoi was Koniag's predecessor. Leisnoi's interests in the disputed lands were the primary subject matter of the agreement; had the parties known that at that time it was impossible for them to negotiate a deal concerning those interests, they almost certainly never would have entered into the agreement.

The only remaining requirement is that Stratman did not bear the risk of the mistake. For the reasons discussed below, he did not. Accordingly, the settlement agreement was not enforceable. It is in just such extraordinary circumstances that Rule 60(b)(6) relief is warranted. See In re Pacific Far E. Lines Inc., 889 F.2d 242, 248, 250 (9th Cir. 1989); see also Keeling, 937 F.2d at 410.

The result we reach is not foreclosed by issue preclusion because the Alaska Supreme Court did not consider whether the settlement agreement was invalid. It merely held that on account of the doctrine of lis pendens, the agreement was not binding on Leisnoi. See Leisnoi, Inc. v. Stratman, 835 P.2d 1202, 1208-10 (Alaska 1992). The Alaska Supreme Court had no occasion to consider whether frustration of the settlement agreement warranted reopening Stratman's district court case.

B. Deliberate Choice

Rule 60(b)(6) relief is not available to remedy harm suffered as a result of a truly deliberate choice or strategy on the part of the moving party. Ackermann v. United States, 340 U.S. 193, 198, 71 S. Ct. 209, 211-12, 95 L. Ed. 207 (1950); Plotkin v. Pacific Tel. & Tel. Co., 688 F.2d 1291, 1293 (9th Cir. 1982).

In its 1982 settlement agreement with Stratman, Koniag warranted that "it will pursue its best efforts to achieve conveyance and patent of the lands, and that it will take no action to prevent conveyance." Stratman could not have anticipated that Koniag would enter into a settlement agreement in the demerger litigation that would declare the merger "void ab initio." That agreement jeopardized the surface-estate conveyance. Despite the agreement it had negotiated with Stratman, Koniag acquiesced in the use of the "void ab initio" language at the request of the shareholder in the demerger litigation. Thus, Koniag helped create the very circumstance that frustrated the 1982 settlement agreement.

It is not significant for the purposes of "deliberate choice" analysis that Stratman agreed to accept a quitclaim deed. The agreement clearly contemplated that the surface estate was part of the deal. Koniag's attorney insisted on the use of a quitclaim deed because "he did not want Koniag to be obligated to convey a greater interest in the land than it received from the U.S. government." The record does not indicate that the attorney's concern stemmed from any worry that Koniag might have only subsurface rights to convey as a result of a demerger, but rather from a concern that Leisnoi might not have taken all of the necessary procedural steps to allow the United States to perfect the conveyance, or that some other procedural problems might arise. If the attorney did have the former concern, nothing suggests that he made it known to Stratman.

On balance, the district court abused its discretion in finding that Stratman made a deliberate choice to ignore the risk that Leisnoi one day might not be bound to make the conveyance. Although the record

shows that Stratman knew of the pending demerger litigation, he could not have known that Koniag would agree to declare the merger "void ab initio" and that that would enable Leisnoi to claim the benefits but eschew the burdens of the settlement agreement. As it is, Leisnoi's position depends upon a much later opinion of the Alaska Supreme Court. That, in turn, elicited a vigorous dissent which asserted that the court had greatly changed the law itself. See Leisnoi, 835 P.2d at 1211 (Moore, J. , dissenting). Thus, no deliberate choice was made.

C. Indispensable Party

Assuming arguendo that Koniag is an indispensable party to this action, its settlement agreement with Stratman, which would apparently require Koniag's dismissal as a defendant were this case to proceed, does not affect the reopening of the action under Federal Rule of Civil Procedure 19. Rule 19 dictates only that indispensable parties be joined in an action. Koniag has been a defendant in this suit since January 1977. Nothing prevents an indispensable-party defendant, once joined, from settling with the plaintiff.

By its very terms, Rule 19(b)'s considerations of "equity and good conscience" as to whether an action should go forward absent an indispensable party come into play only "whenever joinder [is] not feasible." Here, joinder is not only feasible, it was accomplished seventeen years ago.

D. Timeliness of the Rule 60(b)(6) Motion

A Rule 60(b)(6) motion must be brought "within a reasonable time." "What constitutes a reasonable time 'depends on the facts of each case.'" Pacific Far

East, 889 F.2d at 249 (citation omitted). The primary considerations in determining whether a motion to vacate a dismissal was brought within a reasonable time are whether the moving party had good reason for not acting sooner and whether the adverse party was prejudiced by the delay. Id. The district court, without discussion, found that the motion to vacate the dismissal was timely made. We agree.

"In the usual course upon repudiation of a settlement agreement, the frustrated party may sue anew for breach of the agreement and may not, as here, reopen the underlying litigation after dismissal." Keeling, 937 F.2d at 410.

Stratman chose to follow the "usual course" and seek specific performance of the settlement agreement in state court. By not also seeking to reopen the district court litigation at that time, Stratman avoided expending judicial as well as his own resources on litigation that might later prove unnecessary -- or even, depending on its outcome, incompatible with the relief he sought in the specific performance action.[2]

Leisnoi and the Secretary claim that there will be prejudice to Leisnoi's shareholders if the dismissal is set aside. We fail to discern that. Any harm suffered by Leisnoi will occur either because it seeks to enjoy the settlement agreement's benefits without paying for them or because its claim to the land was seriously defective in the first place.

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2 At oral argument appellees conceded that the seven and a half months between the decision in Leisnoi and the bringing of the Rule 60(b)(6) motion was not an unreasonable delay.

Conclusion

After Stratman brought this action against appellees, the attorney defending it believed that Stratman had an excellent (90%) chance of success. Stratman, however, did what we encourage parties to do: he settled the action with the only entity that could then negotiate a settlement with him -- Koniag. Now Leisnoi seeks to secure a Panglossian result for itself. In its best of all possible worlds everything will be for the best as far as it is concerned. Stratman will be held to his agreement with Koniag, but Leisnoi will have no obligations. We understand the desire, but the law does not allow for its gratification.

A material mutual mistake of fact existed at the time Stratman and Koniag negotiated the 1982 settlement agreement. Rule 60(b)(6) relief is warranted when there has been complete frustration of a settlement agreement, and the district court abused its discretion in declining to reopen Stratman's action under these extraordinary circumstances. We therefore reverse the district court's order denying Stratman's motion for Rule 60(b)(6) relief and remand to the district court with instructions that it vacate the judgment of dismissal and reopen Stratman's decertification litigation.[6]

REVERSED AND REMANDED.

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6 We deny the Secretary's motion to strike the reply brief or parts thereof.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Civil No. A76-132

FILED
December 7, 1976

The KODIAK-ALEUTIAN CHAPTER OF the ALASKA CONSERVATION SOCIETY et al., Plaintiffs
v.
Thomas S. KLEPPE, Secretary of the Interior, Defendant.
[423 F.Supp. 544]

MEMORANDUM AND ORDER

VON DER HEYDT, Chief Judge.

THIS CAUSE comes before the court on defendant's motion to dismiss. the case involves land allotments pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601 *et seq*. Certain allotments were tentatively made to various village corporations and a Regional Corporation. Plaintiffs who hold varying interests in these lands seek to set aside these allotments.

The motion is based on three grounds. The first basis is that plaintiffs have failed to join an indispensable party. Due to the nature of the relief sought the court finds that Koniag, Inc. and the various village corporations which have claims to this land are

necessary parties. Fed.R.Civ.Pro. 19(a). Rather than to dismiss the case, however, the court orders the plaintiffs to file an amended complaint naming these parties as defendants or pleading reasons why they are not joined. Fed.R.Civ.Proc. 19(a), (c); *English v. Seaboard Coast Line Rry, Co.*, 465 F.2d 43, 47-48 (5th Cir. 1972).

The second ground for dismissal is that the complaint has failed particularly to allege the circumstances constituting fraud. Fed.R.Civ.Proc. 9(b). This contention is well taken to the extent that the circumstances constituting fraud have not been particularly alleged. Plaintiffs assert, however, that the fraud alleged in the original complaint is mere surplusage. In view of this fact, rather than dismissal, the court will give the plaintiffs two options. If the fraud allegation is mere surplusage the plaintiffs may eliminate it from their amended complaint. Fed.R.Civ.Proc. 12(f). If the allegation is essential plaintiffs will comply with Rule 9(b) in their amended complaint.

The final basis for the motion is failure of the plaintiffs to exhaust their administrative remedies. Plaintiffs initially objected that this ground was not properly raised in a motion to dismiss. Although the court disagrees with this assertion, *see Van Horn v. State Farm Mut. Auto Ins. Co.*, 283 F. Sup. 260 (E.D. Mich. 1966), aff'd 6 Cir., 391 F.2d 910; 5 Wright & Miller, *Federal Practice and Procedure*, § 1360, p. 101 (1975 pocket part), it is not necessary to pass upon the issue. The motion to dismiss on this basis relied on material outside of the pleadings and the court issued an order stating that this was considered a motion for summary judgment. Fed.R.Civ.Proc. 12(b). In accordance with Rule 12(b) the parties were allowed

additional time to present material pertinent to the motion.

Oral argument was heard on the motion prior to the court's order allowing additional briefing and plaintiffs have requested additional arguments on the exhaustion issue. This request is denied in order to expedite the business of the court. Local Rule 5(C)(1).

In the supplemental memoranda the parties concur in the assertion that no need existed to exhaust administrative remedies with respect to two of the three villages. This is because of the fact that these parties' interests were protected by others in the administrative process and that plaintiffs informally presented evidence at the administrative hearings. The motion, therefore, if not withdrawn by the defendant, is denied.

With respect to the third village (Woody Island), plaintiffs do not maintain that they have exhausted their administrative remedies. They admit that they did not present evidence to the administrative bodies passing upon the land claims as they were entitled to do. *See* 43 CFR § 2651.2(9). If this were the sole point of contention on this issue the motion would be well taken as it is established that one cannot exhaust his administrative remedies by default. *Olinger v. Partridge*, 196 F.2d 986, 987 (9th Cir. 1952); *Kuhn v. Nat. Assoc. of Letter Carriers*, 528 F.2d 767, 771 (8th Cir. 1976).

In regard to the determination of eligibility of the third village the plaintiffs mount various attacks. Their central contention, however, is that their failure to exhaust administrative remedies was due to insufficient notice of the administrative hearing. The notice requirements are set out in 43 CFR § 2651.2.

The notice of the proposed action given to "interested parties" other than the villages, the Regional Corporations and the State of Alaska, is publication in the *Federal Register* and one or more newspapers of general circulation in Alaska. 43 CFR § 2651.2(8). Protests are allowed by any interested party if received within 30 days of publication in the *Federal Register*. 43 CFR § 2651.2(9).

The due process clause of the Fourteenth Amendment requires "notice reasonably calculated under the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Schroeder v. City of New York*, 371 U.S. 208, 211, 83 S.Ct. 279, 282, 9 L.Ed.2d 255 (1962). In *Schroeder*, much like the present case, notice of land condemnation that was published in two county newspapers was held to be constitutionally insufficient. An essential element of the holding was that the name and address of the person affected by the action was known or easily ascertainable. In the present case two of the plaintiffs, Stratman and Burton, were holders of federal grazing leases on the land selected by the villages. As to these two plaintiffs who held valuable property rights and whose names and addresses were known or could easily have been ascertained the notice provisions of the regulations were legally insufficient under the due process clause. *Schroeder v. City of N.Y., supra; See also* 44 U.S.C. § 1508. It was, therefore, unnecessary for them to exhaust their administrative remedies. *Piccone v. U.S.*, 407 F.2d 866, 869, 186 Ct.Cl. 752 (1969).

The other plaintiffs, however, fall within a different category. The Alaska Conservation Society through its members and the other individual plaintiffs appear to be interested in the property only as

occasional users. *See Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). As to these plaintiffs the publication in the *Federal Register* was sufficient to comport with the due process as their names and addresses were not known or readily ascertainable. 44 U.S.C. § 1508; *Bank of Commerce v. Bd. of Governors of Fed. Res. System,*, 513 F.2d 164, 166-67 (10th Cir. 1975). These plaintiffs have defaulted on their obligation to exhaust administrative remedies and are not precluded from bringing an action relating to this third village. *Olinger v. Partridge, supra; Kuhn v. Nat. Assoc. of Letter Carriers, supra.*

The additional challenge made to the regulation which places the burden of proof on the protesting party, 43 CFR § 2651.2(9), has not been considered as no party has yet suffered from its operation. The court finds it doubtful that this regulation violates due process but that issue is reserved for later consideration.

Accordingly IT IS ORDERED:

1. THAT defendant's motion to dismiss is partially granted and partially denied in conformity with this opinion.

2. THAT plaintiffs file an amended complaint in conformity with this opinion within 30 days of the date of this order.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A76-132 Civil

FILED
October 16, 1978

Omar Stratman, et al,

Plaintiffs,

v.

CECIL D. ANDRUS, et al,

Defendants.

MEMORANDUM AND ORDER

THIS CAUSE comes before the court on non-government defendants' motion to dismiss. The motion is based on the contention that subsequent actions by the defendants have eliminated any controversy that involves the rights of the plaintiffs.

The amended complaint filed on January 5, 1977, challenged the eligibility of three native villages to receive land under the Alaska Native Claims Settlement Act, 43 U.S.C.A. § 1610(b)(3)(Supp. 1978). The complaint is based on grazing leases issued by the United States on lands tentatively selected by the village corporations. It is the contention of the

plaintiffs that if patents are issued to these villages, rights to the leases created under state law would be terminated (Paragraph VI). The plaintiffs also alleged that an interest in a slaughter-house facility selected by defendant Leisnoi, Inc. (Woody Island) would be terminated if the land were patented to the village corporation (Paragraph VII).

This court previously held that plaintiffs Stratman and Burton were not required to exhaust administrative remedies because they had not received adequate notice of the hearings held on the eligibility of the village corporations at issue in this case. *Kodiak-Aleutian Chapter, Alaska Wildlife Federation v. Kleppe*, 423 F. Supp. 544 (D. Alaska 1976). This court's dismissed [sic] the other plaintiffs for failing to exhaust administrative remedies after notice which was held adequate considering the interest in the land which those "occasional users" alleged.

Two of the villages, Anton Larson Bay and Bells Flats, have not been certified by the Secretary as eligible for land distributions. *See Koniag, Inc. v. Kleppe*, 405 F. Supp. 1360 (D.D.C. 1975), affirmed in part and reversed in part, *Koniag, Inc. , the Village of Uyak v. Andrus*, No. 76-1325 (D.C. Cir., April 28, 1978). Since any litigation over the eligibility of these villages would be premature before a final determination by the Secretary, the only controversy that could possibly remain in existence in this case is between the village corporation for Woody Island, Leisnoi, Inc., and plaintiffs Stratman and Burton.

The exercise of judicial power under Article III of the Constitution is not created by issues of public interest but depends on the existence of a constitutional "case or controversy." A federal court has neither the power to render advisory opinions nor

"to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). A real and substantial controversy must be in existence at all stages of the litigation and not merely at the time the complaint is filed. *Steffel v. Thompson*, 415 U.S. 452, 459, n.10 (1974). A case may be rendered moot by an act of one of the parties which dissolves the controversy. *Preiser v. Newkirk*, 422 U.S. 395 (1975); *A.L. Mechling Barge Lines v. United States*, 368 U.S. 324 (1961).

The affidavit of Karl Armstrong, President and Chairman of the Board of Leisnoi, Inc. indicates that Leisnoi, Inc. has relinquished all claims to the land involving the grazing leases issued by the BLM, No. A-010892 and A-011253.[1] Leisnoi has also conveyed to the Kodiak Island Borough by quitclaim all interest it has in the land on which the slaughter-house facility is located. This property has previously been quitclaimed to Kodiak Livestock Cooperative, Inc., by the Kodiak Borough. Kodiak Livestock is the business through which Stratman and Burton claim an interest in this property.[2] This series of relinquishments and the quitclaim removes all dispute between Stratman and Burton and Leisnoi, Inc. over the land selections involving the federal grazing leases and the slaughter-house. Stratman and Burton claim that a dispute still exists because other land selections by Leisnoi injure

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1 As the defendants have correctly pointed out these leases are issued to Kodiak Cattle Company and Northland Ranches, Inc. Exhibits B and C. Accordingly, the complaint appears to be in violation of the real party in interest rules contained in Fed. R. Civ. P. 17(a).

2 As noted above the fact that the slaughter-house is actually owned by Kodiak Livestock Cooperative, Inc. appears to place the complaint in violation of Rule 17.

their rights in existing state grazing leases and otherwise threaten their future economic interests in the area.

First, any injury to the generalized economic interests alleged by Stratman and Burton in their affidavits is much too speculative to create a case or controversy under Article III. As the Court noted in *United States v. SCRAP*, 412 U.S. 669, 688-89 (1973), "pleading must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be preceptibly harmed by the challenged agency action."

Second, neither this generalized economic harm nor the injury to the state leases was alleged in the complaint. The court disapproves of the effort to revive a dead controversy by pointing to a new one that enters the litigation for the first time at this late date.

Third, even if these state leases were relevant to the present action, the Alaska Native Claims Settlement Act, 43 U.S.C.A. § 1613(g) (Supp. 1978), protects all valid existing rights and makes the lands patented to the Natives subject to these rights. The Act provides:

> "Where prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under 6(g) of the Alaska Statehood Act) has been issued . . . the patent shall contain provisions making it subject to the lease contract . . .

In Order No. 3016 (dated Dec. 14, 1977), Secretary of Interior Andrus has adopted a construction of this section which includes state leases.

It is not necessary for the court to decide at this time whether such a construction is correct, but until the Secretary changes his policy, or a native corporation or village challenges this policy, and does not respect such state leases as valid existing rights, the plaintiffs will not be injured by the transfer of these selections to Leisnoi. Until such time as such injury can be alleged, there is no case or controversy under Article III between the plaintiffs Stratman and Burton and Leisnoi that would allow this court to determine its eligibility as a village or the validity of its land selections.

The other contentions of the plaintiffs have no merit and have been dealt with in this court's previous memoranda.

Accordingly, IT IS ORDERED:

1. THAT non-governmental defendants' motion to dismiss is granted, and the cause is dismissed.

2. THAT the Clerk may prepare an appropriate judgment form.

DATED at Anchorage, Alaska, this 16th day of October, 1978.

/s/ James A. von der Heydt
James A. von der Heydt
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A76-132 Civil

FILED
March 15, 1979

Omar Stratman, Toni Burton
John Murray, Michael Devers,
James Schauff, and Brian Shafford,

Plaintiffs,

v.

CECIL D. ANDRUS, Secretary of the Interior, ANTON LARSON, INC., BELLS FLATS NATIVES, INC., LEISNOI, INC., and KONIAG, INC., REGIONAL NATIVE CORPORATION,

Defendants.

ORDER

The motion of the federal defendant for an order indicating if this Court will grant the federal defendant's motion for relief from judgment having come before this Court, and it appearing after considering the issues that this Court will enter an order granting federal defendant's motion for relief from judgment if a remand of this action is ordered by the Court of Appeals,

IT IS ORDERED that federal defendant's motion for an order indicating if this Court will grant federal defendant's motion for relief from judgment is hereby granted;

and this Court hereby indicates that it will grant federal defendant's motion for relief from judgment.

DATED this 15th day of March, 1979, at Anchorage, Alaska.

/s/ James A. von der Heydt
Judge James A. von der Heydt
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A76-132 Civil

FILED
July 3, 1979

Omar Stratman, Toni Burton
John Murray, Michael Devers,
James Schauff, and Brian Shafford,

Plaintiffs,

v.

CECIL D. ANDRUS, Secretary of the Interior, ANTON LARSON, INC., BELLS FLATS NATIVES, INC., LEISNOI, INC., and KONIAG, INC., REGIONAL NATIVE CORPORATION,

Defendants.

MEMORANDUM AND ORDER

THIS CAUSE comes before the court on remand from the Ninth Circuit Court of Appeals for the purpose of considering defendant's motion for relief from judgment under Rule 60(b), Fed.R.Civ. P. In this cause the plaintiffs, Burton and Stratman, challenge the eligibility of the Native village of Woody Island to make certain selections under the Alaska Native Claims Settlement Act, (ANCSA), 43 U.S.C. § 1601-28 (1976).

In a previous memorandum and order of this court it was held that plaintiffs Stratman and Burton, who are holders of federal grazing leases on the land selected by the village corporation, Leisnoi, Inc., were not required to exhaust their remedies in previous administrative proceedings to determine the eligibility of the village of Woody Island. *Kodiak-Aleutian Chapter of the Alaska Conservation Society v. Kleppe*, 423 F. Supp. 544 (D. Alaska 1976). That decision was based on the rationale that the grazing leases held by Stratman and Burton were "valuable property rights" and therefore they had received inadequate notice of the administrative proceeding that determined the eligibility of the village of Woody Island and its corporation, Leisnoi, Inc. 423 F. Supp. at 547.

In an unpublished memorandum and order of October 16, 1978, this court held that the claims of Stratman and Burton were moot because Leisnoi, Inc. had relinquished all claims to the land involving the federal grazing leases and a slaughter-house facility in which the plaintiffs hold an interest. The court accordingly granted the non-government defendants' motion to dismiss and entered final judgment dismissing the entire case as moot.

The government defendants in their motion for relief from judgment request this court to vacate that portion of the court's previous opinion that would allow parties in the position of Stratman and Burton to collaterally attack an administrative determination of Native village eligibility. The government correctly contends that the plaintiffs could allege no injury to their property interest because the Alaska Native Claims Settlement Act, 43 U.S.C. § 1613(g) protects all valid existing rights and makes the land patented to the Natives subject to those rights. The Act provides:

> Where prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under 6(g) of the Alaska Statehood Act) has been issued . . . the patent shall contain provisions making it subject to the lease, contract . . ."

43 U.S.C. § 1613(g). This provision means that whatever property interests were held by Stratman and Burton, including the federal grazing leases, could not be injured by Woody Island's eligibility and the selection of land by its village corporation. Any patents issued to the village corporation would have to protect the property interests upon which the court had previously based its decision on exhaustion of administrative remedies.

Federal courts have neither the power to render advisory opinions nor "to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). In view of the fact that Stratman and Burton could not have been injured by the village selections and the serious implications of allowing a collateral attack on Native village eligibility under ANCSA, this court must vacate that portion of the memorandum and order of December 7, 1976, that allowed the plaintiffs to litigate Woody Island's eligibility.

Accordingly IT IS ORDERED:

1. THAT defendant's motion for relief from judgment is granted.

2. THAT portion of the court's memorandum and order of December 7, 1976, denying defendants'

motion to dismiss as to plaintiffs Stratman and Burton is vacated.

3. The claims of Stratman and Burton are dismissed.

4. The final judgment entered by this court on October 16, 1978, is reinstated in conformity with this memorandum.

DATED at Anchorage, Alaska, this second day of July, 1979.

/s/ James A. von der Heydt
James A. von der Heydt
UNITED STATES DISTRICT JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A76-132 Civil

FILED
August 18, 1993

)mar Stratman, et al.

Plaintiff,

v.

Bruce Babbitt, et al.

Defendants-Appellees.

MEMORANDUM AND ORDER

I. INTRODUCTION.

This cause comes before the court on motion to vacate dismissal and reopen case, filed March 5, 1993 (Docket No. 117), by plaintiff Omar Stratman. Defendants Koniag, Inc., Leisnoi, Inc., and Bruce Babbitt, Secretary of the Interior, filed oppositions to plaintiff's motion. The court heard oral argument on August 12, 1993 at Anchorage. For the reasons outlined below, plaintiff's motion is denied.

II. BACKGROUND.

Many years, pleadings, arguments and agreements have transpired since the inception of this case. The case chronology was fully laid out in unabridged form by the Alaska Supreme Court in its opinion in Leisnoi, Inc. v. Stratman, 835 P.2d 1202 (Alaska 1992). Other salient facets and subtle interstices have been supplied by the parties in the most recent pleadings. There appears to be little disagreement among the parties regarding the sequence of events leading up to the present motion. A similar characteristic in each of the pleadings is the differing interpretation of those events. Finding no need to be repetitious, the court will rely on the background information supplied by the parties as well as the statement outlined in the Alaska Supreme Court's decision.

III. DISCUSSION.

A. Standard for Vacating Dismissal & Reopening Case.

A court may, in the exercise of its discretion, grant a motion for relief from judgment under Fed. R. Civ. P. 60(b)(6). United States v. Sparks, 685 F.2d 1128, 1130 (9th Cir. 1982). Relief is granted under the rule only in extraordinary circumstances. Ackermann v. United States, 340 U.S. 193, 71 S. Ct. 209 (1950); Keeling v. Sheet Metal Workers Int'l Assn. Local Union 162, 937 F.2d 408, 410 (9th Cir. 1991). The rule does not contemplate relief from alleged harm suffered as a result of calculated, deliberate choices or strategies. Ackermann, 340 U.S. at 198; Plotkin v. Pacific Telephone and Telegraph Co., 688 F.2d 1291, 1293 (9th Cir. 1982).

B. Plaintiff's Motion.

1. Relief Under Fed. R. Civ. P. 60(b)(6).

Plaintiff's final reply synthesizes his contentions as to why, under Fed. R. Civ. P. 60(b)(6), relief is warranted. The three reasons advanced by plaintiff for vacating the dismissal and reopening the case are (1) because the settlement agreement was repudiated by Leisnoi; (2) because the settlement agreement was judicially determined to be invalid as to Leisnoi; and (3) because Koniag had no authority to enter the stipulated dismissal on Leisnoi's behalf. The court will address these arguments in turn.

a. Leisnoi Repudiated the Settlement Agreement.

At the time the settlement agreement was signed, Leisnoi, Inc. had merged with Koniag, Inc. Leisnoi, Inc. did not exist as a corporate entity. Leisnoi could not have legally signed the settlement agreement on its own behalf. More importantly, while the settlement negotiations were in progress, a Leisnoi shareholder had filed a demerger action, seeking to set aside the merger of Leisnoi with Koniag. Even more significantly, plaintiff was aware that Leisnoi was attempting to halt the settlement agreement. That attempt was denied by the court and plaintiff proceeded to sign the settlement agreement. By the terms of the agreement, plaintiff was willing to accept a quitclaim deed from Koniag, Inc. for whatever rights to whatever property Koniag had to transfer to plaintiff. Further, as part of the settlement agreement, plaintiff agreed to dismiss the decertification action.

On balance, plaintiff's request for relief for the above reason does weigh in favor of vacating the

dismissal and reopening the case. Plaintiff argues that Leisnoi was a party to the agreement because Leisnoi would have been bound by the agreement but for the subsequent demerger settlement agreement and the Alaska Supreme Court's interpretation of the doctrine of lis pendens. The Alaska Supreme Court held that the merger of Koniag and Leisnoi was void ab initio. Because the merger never occurred, Koniag could not have signed on behalf of Lesinoi. Leisnoi was not a signatory to plaintiff's settlement agreement with Koniag. It is not possible to repudiate a document one did not sign. Because Leisnoi did not sign the settlement agreement, it is inaccurate to content that Leisnoi repudiated the agreement.

b. Settlement Agreement Invalid.

Plaintiff also argues that the Alaska Supreme Court determined that the settlement agreement was unenforceable against Leisnoi. What the court did not determine, continues plaintiff, was not that Leisnoi was not a party to it, or that no agreement was in existence. What the court did determine was that Leisnoi could not be bound by the settlement agreement because the merger was void ab initio. Thus, plaintiff concludes, at the time the decertification settlement agreement was signed, Leisnoi was clearly a party to the agreement.

Plaintiff further argues that the issue before the Alaska Supreme Court was whether the agreement was specifically enforceable against Leisnoi. What the court did not address was whether Leisnoi repudiated the agreement within the meaning of Fed. R. Civ. P. 60(b)(6).

Assuming plaintiff's interpretation of the Alaska Supreme Court decision correct, there was no need for

the court to consider whether Leisnoi repudiated the agreement. It would have made little sense for the court, having determined the agreement was unenforceable against Leisnoi, to decide whether Leisnoi repudiated an agreement which could not be enforced against it. Nor does it make further sense for this court to decide whether Leisnoi repudiated an agreement which has been judicially determined to be unenforceable against it.

c. No Authority to Enter Stipulated Dismissal.

Plaintiff's third argument for warranting Fed. R. Civ.. P. 60(b)(6) relief is that Koniag had no authority to enter into a stipulated dismissal on Leisnoi's behalf. Plaintiff submits that if Leisnoi was never bound by the settlement agreement because Koniag had no authority to enter it on Leisnoi's behalf, then Koniag, likewise, would have no authority to stipulate to the dismissal of Leisnoi.

The stipulated dismissal of this case was by order of the Ninth Circuit on motion from plaintiff. Federal Rule of Civil Procedure 42(a) provides that "[a]n appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court." Plaintiff moved to dismiss the case and agreed to terms of dismissal by signing the settlement agreement. The rule relied upon by plaintiff, Fed. R. Civ. P. 41(a)(1)(ii), is not applicable.

2. Failure of Settlement Not a Deliberate Choice.

Plaintiff submits that he did not make a deliberate and conscious choice to enter a settlement

agreement that was subject to invalidation. This argument belies the fact that plaintiff was aware of the attempt by the Leisnoi stockholders to prevent Koniag and plaintiff from signing the agreement. In the state court action, Judge Hunt found that plaintiff had knowledge that if the demerger was granted, Leisnoi would be reconstituted as a separate corporation and its land selection rights would return to it. Nothing was included in the settlement agreement to cover the contingency of the demerger. It appears that plaintiff appreciated the risks, was aware of the demerger litigation, decided to use a quitclaim deed and proceed to enter the settlement agreement.

3. Other Arguments.

There are several other counter arguments which are raised by defendants in the oppositions filed which plaintiff addresses in his reply. It is submitted by defendants Leisnoi and Koniag that plaintiff's motion is not timely. The court finds that under Fed. R. Civ. P. 60(b)(6) and the sequence of this litigation, plaintiff brought the motion within a reasonable time. Because the issue of intervening rights goes to the issue of whether the motion was brought within a reasonable period of time, the court does not reach the issue of intervening rights.

Defendants argue that plaintiff's motion to vacate dismissal and reopen case should not be granted because plaintiff could not prevail on the merits of his claim. Plaintiff counters that the standard posed by defendants is only required on a motion to grant relief from a default judgment, where default was attributable to the movant's wrongful conduct. Plaintiff contrasts this case, where he argues there was a repudiation of the settlement agreement or the unauthorized stipulation of dismissal which was

attributable to defendant's wrongful conduct. The court, however, decided above there was no repudiation nor unauthorized stipulation of dismissal.

In light of the above discussion, the briefing submitted by the parties and the arguments made during oral argument, the court does not reach plaintiff's contentions to defendants' arguments why no meritorious defense is made by plaintiff to reopen the case. However, extraordinary circumstances do not exist which would favor a reopening of this case.

IV. ORDER

Accordingly, IT IS ORDERED THAT plaintiff's motion to vacate dismissal and reopen case is DENIED.

DATED at Anchorage, Alaska, this 17th day of August, 1993.

/s/ James A. von der Heydt
United States District Judge

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 93-36006

FILED
February 22, 1995

OMAR STRATMAN, et al.,
Plaintiffs-Appellants,

v.

BRUCE BABBITT, Secretary of the Interior, et al.,
Defendants-Appellees.

ORDER

Before: Wright, Beezer, and Fernandez, Circuit Judges

The panel has unanimously voted to deny the petition of appellant, Leisnoi, Inc., for rehearing and has unanimously voted to deny the petition of appellant, Koniag, Inc., for reconsideration. The suggestions for rehearing en banc, filed by Leisnoi, Inc., and Koniag, Inc., were circulated to the active judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing is DENIED, the petition for reconsideration is DENIED, and the suggestions for rehearing en banc are REJECTED.

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-4480

FILED
November 27, 1981

OMAR STRATMAN, et al.,
Plaintiffs-Appellants,

v.

JAMES G. WATT, Secretary of the Interior, et al.,
Defendants-Appellees.

ORDER

Before: Wallace, Hug, and Schroeder, Circuit Judges

The Panel as constituted in the above case has voted to deny the petition for rehearing.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A76-132 Civil

OMAR STRATMAN, TONI BURTON, JOHN MURRAY, MICHAEL DEVERS, JAMES SCHAUFF, AND BRIAN SHAFFORD,

Plaintiffs,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ANTON LARSEN, INC., BELLS FLATS NATIVES, INC., LEISNOI, INC., AND KONIAG, INC., REGIONAL NATIVE CORPORATION,

Defendants.

MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

Federal defendant, Cecil D. Andrus, Secretary of the Interior, respectfully petitions the Court to clarify the extent to which the Memorandum and Order entered in the above-captioned case on October 16, 1978, modifies the earlier Memorandum and Order filed on December 7, 1976, *sub nom, Kodiak-Aleutian Chapter of the Alaska Conservation Society v. Kleppe*,

423 F.Supp. 544 (D.Ak. 1976). Federal defendant seeks relief from judgment in this case, pursuant to Civil Rule 60(b), with respect to those determinations presented in the Court's 1976 Memorandum and Order which were superseded by the Court's subsequent Memorandum and Order, filed in 1978.

In its 1976 Memorandum and Order, the Court held, *inter alia*, that holders of federal grazing leases on lands selected by an unlisted village under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §§ 1601 *et seq.*, would be permitted to challenge the administrative determination of the village's eligibility without having exhausted their administrative remedies. 423 F.Supp. at 527. Relying on *Schroeder v. City of New York*, 371 U.S. 208, 211 (1962), the Court ruled that since the leaseholders possessed "valuable property rights" with respect to the selected land, and since the names and addresses of the leaseholders were known or could have easily been ascertained, notice by publication pursuant to 43 CFR § 2651.2 of an administrative contest procedure relating to the government's determination of village eligibility was constitutionally inadequate with respect to the leaseholders. The Court distinguished the process due the leaseholders from that due the other plaintiffs, who, as members of a local conservation organization, were only "occasional users" of the selected land, and whose names and addresses were not known or readily ascertainable. The latter plaintiffs were held to have defaulted on their obligation to pursue their administrative remedies, and were dismissed. *Id.*

Thus, under the Court's 1976 Order, the eligibility of unlisted villages throughout the State was subject to collateral attack by third parties holding federal grazing leases and, presumably, similar interests in

lands subject to selection by the villages. This ruling significantly affected the finality of administrative eligibility determinations, the finality of which is crucial to the effective and timely implementation of ANCSA.[1]

The federal defendant respectfully submits that the conclusions and rationale expressed by the Court in its recent Order moots the Court's prior assumptions and determinations regarding the nature of the plaintiffs' interests and their obligation to exhaust available administrative remedies. Specifically, the Court points out in its recent Memorandum and Order that Section 14(g) of ANCSA, 43 U.S.C.. § 1613(g), protects all valid existing rights in selected land, making the lands patented to the Natives subject to these rights. (Memorandum and Order, filed 10/16/78, p.4). That section provides in pertinent part:

> Where prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under 6(g) of the Alaska Statehood Act) has been issued . . . the patent shall contain provisions making it subject to the lease contract . . . .

The Court referenced Section 14(g) in its Memorandum and Order as a basis for its determination that plaintiffs' interests in state grazing leases would not be injured by the transfer to the village corporation of

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[1] Concern over the impact of the 1976 ruling is not exclusive to federal defendant. Non-federal defendants filed a notice of cross-appeal on the issue of notice addressed in that ruling on December 27, 1978. Because the government views the import of the Court's most recent Order as having basically resolved the notice question, federal defendant deemed it appropriate to move for relief from the Court's initial Order in the interest of judicial economy.

lands subject to such leases. Precisely the same reasoning applies to the plaintiffs' interests in federal grazing leases. Those interests simply are not subject to injury by the transfer of lands to the village corporation because of the protective provisions of ANCSA, notably Section 14(g).

Following its discussions of ANCSA's protection of valid existing rights, the Court concluded:

> Until such time as such an injury can be alleged, there is no case or controversy under Article III between the plaintiffs Stratman and Burton and Leisnoi that would allow this Court to determine its eligibility as a village or the validity of its land selections. (Memorandum and Order, filed 10/16/78, p. 4)

While the Court's holding implicity [sic] applies to federal grazing leases as well as state grazing leases, federal defendant seeks clarification of this point because of the importance to it of preserving the finality of village eligibility determinations, and the need for protecting those determinations from collateral attack by third parties whose interests are not cognizably affected by said determinations.

Reading the Court's first Memorandum and Order in light of its subsequent Order then, the Government submits that plaintiffs are entirely precluded from challenging the Leisnoi eligibility determination because Section 14(g) of ANCSA resolves any case or controversy with respect to plaintiffs' rights as leaseholders. To the extent plaintiffs possess what would seen to be a sufficient property interest to required *Schroeder*-type notice, that interest is protected by Section 14(g) of ANCSA, which extinguishes any case or controversy as to that interest

or possible injury thereto. Interests of plaintiffs not protected by Section 14(g) are necessarily mere expectancies or perhaps hopes with respect to future leasehold renewal. By their very nature the latter interests are not legal contractual rights which are binding upon the lessor, or they would be covered by Section 14(g). Such interests are the same as, or akin to, the generalized economic interests of plaintiffs, which this Court has held are "much too speculative to create a case or controversy under Article III." (Memorandum and Order, filed 10/16/78, p.3)

Federal defendant submits that under the Court's reasoning as set forth in its Memorandum and Order of October 16, 1978, which takes into account the statutory mechanism within ANCSA for resolving conflicts between lessees of federal (or state) land and native corporations which subsequently select the same land, an Article III case or controversy has never existed with respect to plaintiffs' interests in the selected land, and that therefore the Court's 1976 ruling with respect to notice is moot.

Moreover, under the rationale adopted by the Court in its 1978 Order, the *Schroeder* case is no longer relevant to this dispute. At the heart of the Court's 1978 Order, is its recognition of ANCSA's internal mechanism for resolving conflicts between cognizable interests in Alaskan land. The condemnation statute which was the basis for the *Schroeder* action provides no such internal mechanism for protecting cognizable interests. The notice requirements of *Schroeder* may be necessary to protect interests which might otherwise be inadvertently extinguished because of the nature of *in rem* actions, such as condemnation actions. That policy is not applicable to the case at bar where plaintiffs' rights are automatically protected. Accordingly, federal defendant moves this Court for

relief from its 1976 ruling with respect to the notice requirements applicable to plaintiffs.

The specific relief requested by federal defendant is authorized by Civil Rule 60(b). It is not necessary to determine precisely the clause under which relief if proper as long as the Motion for relief under Rule 60(b) is made within the appropriate time period. 7 *Moore's Federal Practice* § 60.27[1], p. 346. In the instant case, categorization of the relief sought would probably place it within clause (6), the residual category. Relief sought under that clause is subject only to a "reasonable" time limitation. Although federal defendant seeks relief from an order entered over two years ago, the order did not become final until the Court entered judgment October 16, 1978. Moreover, the need for relief from the 1976 Order was not clear until the Court issued its 1978 Memorandum and Order. Federal defendant submits that its Motion is timely under the circumstances, and that the foregoing Memorandum sets forth adequate justification for the relief sought. Clarification of the Court's 1976 opinion in light of its 1978 Memorandum and Order will be of great benefit to defendant Secretary of the Interior, who is charged with the prompt administration of ANCSA. Accordingly, he respectfully requests that such clarification issue.

DATED this 30th day of January, 1979, at Anchorage, Alaska.

Respectfully submitted,

ALEXANDER O. BRYNER
United States Attorney

/s/ CYNTHIA L. PICKERING
Cynthia L. Pickering

Attorney
Land and Natural
Resources Division
U.S. Department of Justice

APPENDIX K

43 C.F.R. § 2650.7 (1994) Publication.

(d) For all land selections made under the Act, in order to give actual notice of the decision of the Bureau of Land Management proposing to convey lands, the decision shall be served on all known parties of record who claim to have a property interest or other valid existing right in land affected by such decision, the appropriate regional corporation, and any Federal agency of record. In order to give constructive notice of the decision to any unknown parties, or to known parties who cannot be located after reasonable efforts have been expended to locate, who claim a property interest or other valid existing right in land affected by the decision, notice of the decision shall be published once in the FEDERAL REGISTER and, once a week, for four (4) consecutive weeks, in one or more newspapers of general circulation in the State of Alaska nearest the locality where the land affected by the decision is situated, if possible. Any decision or notice actually served on parties or constructively served on parties in accord with this subsection shall state that any party claiming a property interest in land affected by the decision may appeal the decision to the Bureau of Land Appeals.

43 C.F.R. § 2651.2 (1994) Eligibility requirements.

(2) *Findings of fact and notice of proposed decision.* After completion of the investigation and examination of records and evidence with respect to the eligibility of a village listed in sections 11(b)(1) and 16(a) of the Act for land benefits, the Director, Juneau Area Office, Bureau of Indian Affairs, shall publish in the FEDERAL REGISTER and in one or more

newspapers of general circulation in Alaska his proposed decision with respect to such eligibility and shall mail a copy of the proposed decision to the affected village, all villages located in the region in which the affected village is located, all regional corporations within the State of Alaska and the State of Alaska. His proposed decision is subject to protest by any interested party within 30 days of the publication of the proposed decision in the FEDERAL REGISTER. If no valid protest is received within the 30-day period, such proposed decision shall become final and shall be published in the FEDERAL REGISTER. If the final decision is in favor of a listed village, the Director, Juneau Area Office, Bureau of Indian Affairs, shall issue a certificate as to the eligibility of the village in question for land benefits under the act, and certify the record and the decision to the Secretary. Copies of the final decisions and certificates of village eligibility shall be mailed to the affected village, all villages located in the region in which the affected village is located, all regional corporations within the State of Alaska, and the state of Alaska.

(4) *Action on protest.* Upon receipt of a protest, the Director, Juneau Area Office, Bureau of Indian Affairs, shall examine and evaluate the protest and supporting evidence required herein, together with his record of findings of fact and proposed decision, and shall render a decision on the eligibility of the Native village that is the subject of the protest. Such decision shall be rendered within 30 days from the receipt of the protest and supporting evidence by the Director, Juneau Area Office, Bureau of Indian Affairs. The decision of the Director, Juneau Area Office, Bureau of Indian Affairs, shall be published in the FEDERAL REGISTER and in one or more newspapers of general circulation in the State of Alaska and a copy of the

decision and findings of fact upon which the decision is based shall be mailed to the affected village, all villages located in the region in which the affected village is located, all regional corporations within the State of Alaska, the State of Alaska, and any other party of record. Such decision shall become final unless appealed to the Secretary by a notice filed within 30 days of its publication in the FEDERAL REGISTER in accordance with the regulations governing appeals set out in 43 CFR part 4, subpart E.

(5) *Action on appeals.* Appeals shall be made to the Board of Land Appeals in accordance with subpart E of part 4 of this title. Decisions of the Board on village eligibility appeals are not final until personally approved by the Secretary.

(8) *Action on application for eligibility.* Upon receipt of an application which appears to meet the criteria for eligibility, th Director, Juneau Area Office, Bureau of Indian Affairs, shall have a notice of the filing of the application published in the FEDERAL REGISTER and in one or more newspapers of general circulation in Alaska and shall promptly review the statements contained in the application. He shall investigate and examine available records and evidence that may have a bearing on the character of the village and its eligibility pursuant to this subpart 2651, and thereafter make findings of fact as to the character of the village. No later than December 19, 1973, the Director, Juneau Area Office, Bureau of Indian Affairs, shall make a determination as to the eligibility of the village as a Native village for land benefits under the act and shall issue a decision. He shall publish his decision in the FEDERAL REGISTER and in one or more newspapers of general circulation in Alaska and shall mail a copy of the decision to the representative or representatives of the village, all villages in the

region in which the village is located, all regional corporations, and the State of Alaska.

(9) *Protest to eligibility determination.* Any interested party may protest a decision of the Director, Juneau Area Office, Bureau of Indian Affairs, regarding the eligibility of a Native village for land benefits under the provisions of sections 11(b)(3)(A) and (B) of the Act by filing a notice of protest with the Director, Juneau Area Office, Bureau of Indian Affairs, within 30 days from the date of publication of the decision in the FEDERAL REGISTER. A copy of the protest must be mailed to the representative or representatives of the village, all villages in the region in which the village is located, all regional corporations within Alaska, the State of Alaska, and any other parties of record. If no protest is received within the 30-day period, the decision shall become final and the Director, Juneau Area Office, Bureau of Indian Affairs, shall certify the record and the decision to the Secretary. No protest shall be considered which is not accompanied by supporting evidence. Anyone protesting a decision concerning the eligibility or ineligibility of an unlisted Native village shall have the burden of proof in establishing that the decision is incorrect. Anyone appealing a decision concerning the eligibility or ineligibility of an unlisted Native village shall have the burden of proof in establishing that the decision is incorrect.

(10) *Action on protest appeal.* Upon receipt of a protest, the Director, Juneau Area Office, Bureau of Indian Affairs, shall follow the procedure outlined in paragraph (a)(4) of this section. If an appeal is taken from a decision on eligibility, the provisions of paragraph (a)(5) of this section shall apply.

APPENDIX L

PUBLIC LAW 92-203 -- DEC. 18, 1971

JOINT FEDERAL-STATE LAND USE PLANNING COMMISSION FOR ALASKA

Sec. 17. (b)(1) The Planning Commission shall identify public easements across lands selected by Village Corporations and the Regional Corporations and at periodic points along the courses of major waterways which are reasonably necessary to guarantee international treaty obligations, a full right of public use and access for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important.

(2) In identifying public easements the Planning Commission shall consult with appropriate State and Federal agencies, shall review proposed transportation plans, and shall receive and review statements and recommendations from interested organizations and individuals on the need for and proposed location of public easements: *Provided*, That any valid existing right recognized by this Act shall continue to have whatever right of access as is now provided for under existing law and this subsection shall not operate in any way to diminish or limit such right of access.

(3) Prior to granting any patent under this Act to the Village Corporation and Regional Corporations, the Secretary shall consult with the State and the Planning Commission and shall reserve such public easements as he determines are necessary.

APPENDIX M

THE ALASKA NATIVE CLAIMS SETTLEMENT ACT, PUB. L. NO. 92-203, 85 STAT. 688 (1971), codified at 43 U.S.C. § 1601, et seq.

§ 1601. Congressional findings and declaration of policy

Congress finds and declares that –

(a) there is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims;

(b) the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation, with maximum participation by Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska;

§ 1610. Withdrawal of public lands

(b) List of Native villages subject to chapter; review; eligibility for benefits; expiration of withdrawals for villages; alternative eligibility; eligibility of unlisted villages

(2) Within two and one-half years from December 18, 1971, the Secretary shall review all of the villages listed in subsection (b)(1) hereof, and a village shall not be eligible for land benefits under section 1613(a) and (b) of this title, and any withdrawal for such village shall expire, if the Secretary determines that --

(A) less than twenty-five Natives were residents of the village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; or

(B) the village is of a modern and urban character, and the majority of the residents are non-Native.

Any Native group made ineligible by this subsection shall be considered under section 1613(h) of this title.

(3) Native villages not listed in subsection (b)(1) hereof shall be eligible for land and benefits under this chapter and lands shall be withdrawn pursuant to this section if the Secretary within two and one-half years from December 18, 1971, determines that --

(A) twenty-five or more Natives were residents of an established village on the 1970 census enumeration date as shown by the census or other evidence satisfactory to the Secretary, who shall make findings of fact in each instance; and

(B) the village is not a modern and urban character, and a majority of the residents are Natives.

§1611. Native land selections

(a) Acreage limitation; proximity of selections and size of sections and units; waiver

(1) During a period of three years from December 18, 1971, the Village Corporation for each Native village identified pursuant to section 1610 of this title shall select, in accordance with rules established by the Secretary, all of the township or townships in which any part of the village is located, plus an area that will make the total selection equal to the acreage to which the village is entitled under section 1613 of this title. The selection shall be made from lands withdrawn by section 1610(a) of this title: *Provided*, That no Village Corporation may select more than 69,120 acres from lands withdrawn by section 1610(a)(2) of this title, and not more than 69,120 acres from the National Wildlife Refuge System, and not more than 69,120 acres in a National Forest: *Provided further*, That when a Village Corporation selects the surface estate to lands within the National Wildlife Refuge System or Naval Petroleum Reserve Numbered 4, the Regional Corporation, for that region may select the subsurface estate in an equal acreage from other lands withdrawn in section 1610(a) of this title within the region, if possible.

(2) Selections made under this subsection (a) of this section shall be contiguous and in reasonably compact tracts, except as separated by bodies of water or by lands which are unavailable for selection, and shall be in whole sections and, wherever feasible, in units of not less than 1,280 acres:

§ 1613. Conveyance of lands

(g) Valid existing rights preserved; saving provisions in patents; patentee rights; administration; proportionate rights of patentee

All conveyances made pursuant to this chapter shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this chapter, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the lessee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him.

(2)

No. 94-2074

Supreme Court, U.S.
FILED
AUG 16 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

KONIAG, INC., PETITIONER

v.

OMAR STRATMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that respondent Stratman should be granted relief from judgment under Federal Rule of Civil Procedure 60(b)(6), based on its determination that the earlier settlement of the lawsuit was based on a mutual mistake of fact.

2. Whether the holder of a federal grazing lease on land subject to selection under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*, is entitled to actual notice of Native village eligibility proceedings.

3. Whether a recreational user of land subject to selection under ANCSA has standing to challenge a Native village eligibility determination.

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OPINIONS BELOW

The court of appeals' 1994 opinion (Pet. App. 12a-19a) is not published, but the decision is noted at 42 F.3d 1402 (Table). The court of appeals' 1981 opinion (Pet. App. 1a-11a) is reported at 656 F.2d 1321.

JURISDICTION

The first judgment of the court of appeals was entered on September 8, 1981. A petition for rehearing was denied on November 27, 1981. Petitioner filed a petition for a writ of certiorari, but it was

dismissed on joint motion of the parties pursuant to Supreme Court Rule 53.1 (1980),[1] following a settlement between petitioner and respondent Omar Stratman. See 456 U.S. 901 (1982).

The second judgment of the court of appeals, ordering that the case be reopened, was entered on December 5, 1994. A petition for rehearing was denied on February 22, 1995. The petition for a writ of certiorari was filed on May 22, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a challenge to the Department of the Interior's certification of the village of Woody Island as a Native village eligible to receive land and other benefits under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1601 *et seq.*

1. ANCSA was enacted in 1971 to accomplish "with certainty," and "without litigation," a "fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." 43 U.S.C. 1601(a) and (b).[2] The Act provided for the distribution of land and money to eligible Native villages and to

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[1] Supreme Court Rule 53.1 (1980) stated as follows:

> Whenever the parties thereto, at any stage of the proceedings, file with the Clerk an agreement in writing that any cause be dismissed, specifying the terms with respect to costs, and pay to the Clerk any fees that may be due, the Clerk, without further reference to the Court, shall enter an order of dismissal.

[2] All citations are to the 1988 edition of the United States Code as supplemented in 1993. As petitioner points out (Pet. 3 n.6), the relevant Sections are substantially identical to the 1976 edition, which was in effect when this lawsuit was initiated.

Native regional corporations, in exchange for which all aboriginal titles and claims were extinguished. See 43 U.S.C. 1601 *et seq.* Each eligible Native village was entitled by the Act to select between approximately 70,000 and 160,000 acres from public lands in the village's vicinity. 43 U.S.C. 1613. The Act provided that the village then would receive a patent to the surface estate of the selected land, and the subsurface estate of the selected land would be patented to the Native regional corporation. *Ibid.* The Act also provided that the residents of each eligible Native village were required to "organize as a business for profit or nonprofit corporation under the laws of the State before the Native village may receive patent to lands or benefits under this chapter, except as otherwise provided." 43 U.S.C. 1607(a).

The village of Woody Island, located on a small island in the Kodiak region of Alaska, applied to the Secretary of the Interior for certification as an eligible Native village. Pet. App. 4a; see 43 U.S.C. 1610(b)(3). After investigation and public notice, the Secretary found Woody Island qualified and approved its application. Pet. App. 4a. Leisnoi, Inc., was created as Woody Island's Native village corporation to select lands and to receive cash benefits. *Ibid.* Pursuant to its entitlement under ANCSA, Leisnoi selected its land, some of which partly overlapped land that was subject to a federal grazing leasehold by respondent Omar Stratman, a cattle rancher. *Id.* at 23a.

2. a. In 1976, respondent Stratman and others filed suit against the Secretary in the United States District Court for the District of Alaska, requesting a permanent injunction against the transfer of any

land from the United States to Leisnoi.[3] All the plaintiffs alleged that they used some of the lands for recreational purposes. Some plaintiffs, including Stratman, also alleged harm to their property rights. The plaintiffs contended that Woody Island did not meet ANCSA's requirements to be certified as an eligible Native village. Pet. App. 2a. Leisnoi and the Native regional corporation, Koniag, Inc. (petitioner herein), were joined as necessary parties due to the fact that they would be the recipients of title to the surface estate and the subsurface estate, respectively, upon conveyance by the United States under 43 U.S.C. 1613(f). Pet. App. 20a-21a.

The district court granted the Secretary's motion to dismiss the claims by the recreational plaintiffs for failure to exhaust administrative remedies. Pet. App. 23a-24a. The court refused to dismiss Stratman's claims, however, based on its conclusion that Stratman's record interest as a grazing lease holder entitled him to actual, rather than constructive, notice of Leisnoi's application and made it unnecessary for him to exhaust administrative remedies. *Id.* at 23a, 26a. Leisnoi ultimately relinquished its ANCSA claims to the lands overlapping Stratman's grazing lease, thereby mooting his claims based on economic injury. *Id.* at 5a & n.3; see also *id.* at 25a-

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[3] The action originally challenged the eligibility of two other villages as well, but those claims were separately litigated in a different action. See *Koniag, Inc.* v. *Kleppe*, 405 F. Supp. 1360 (D.D.C. 1975), aff'd in part, rev'd in part, 580 F.2d 601 (D.C. Cir.), cert. denied, 439 U.S. 1052 (1978). Another rancher, Toni Burton, was also a plaintiff when this case was filed, but she has ceased to be involved in the litigation.

29a.[4] The district court then dismissed the case because of the lack of a case or controversy. *Ibid.*

b. Stratman and the other recreational users appealed the dismissal of their claims based on potential injury to their recreational uses. The court of appeals held that all the plaintiffs had standing as recreational users to challenge the village's eligibility. Pet. App. 6a-7a. The court nonetheless affirmed the dismissal of the claims based on recreational use for failure to exhaust administrative remedies. *Id.* at 8a. The court held that Stratman no longer had standing to assert economic interests in the land, see *id.* at 5a n.3, but it reversed the district court's dismissal of Stratman's recreational use claims because Stratman was not given the actual notice to which he was entitled when (prior to Leisnoi's relinquishment of its ANCSA claims to the land) his economic interests were still at issue. The court of appeals therefore remanded the case for consideration of the exhaustion issue as to Stratman. *Id.* at 8a-11a.

c. Koniag filed a petition for a writ of certiorari, but, while the petition was pending, Koniag and Stratman entered into a settlement that became effective in 1')2. Pet. 10; Pet. App. 16a. Koniag agreed to quitclaim to Stratman its interest in 17,637 acres of the land that had been selected by Leisnoi, in exchange for Stratman's agreement to dismiss his lawsuit with prejudice and to pay $233,099.50 for

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[4] Following Stratman's first appeal and the remand, the district court held, as an additional ground for dismissing Stratman's claims, that Stratman had no economic interests to assert because transfers under the ANCSA were subject to valid existing rights, which included whatever property interest Stratman held. See Pet. App. 28a-29a; Pet. 8-9 & n.16.

Koniag's interest in the quitclaimed land. Pursuant to the agreement, Stratman's dismissal of the suit took place immediately and this Court granted Koniag's motion under Rule 53.1 (1980) to dismiss its petition for a writ of certiorari. Gov't C.A. Br. 11-12; see *Koniag, Inc.* v. *Stratman*, 456 U.S. 901 (1982). The conveyance of Koniag's interest in the land to Stratman, however, was to occur thirty days after the United States conveyed the lands to Koniag, which had not yet occurred. Gov't C.A. Br. 12.

3. a. More than ten years after the settlement was entered, Stratman filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6), seeking to vacate the 1982 dismissal and to reopen his suit against Koniag, Leisnoi, and the Secretary. Stratman contended that relief under Rule 60(b)(6) was appropriate, alleging that Leisnoi had repudiated the settlement agreement, the settlement agreement had been deemed invalid as to Leisnoi, and Koniag lacked the authority to stipulate to dismissal on behalf of Leisnoi. Pet. App. 36a-38a.

b. Stratman sought to reopen the case because he did not obtain the surface rights to the land identified in the settlement agreement. Stratman was denied the surface rights because the settlement provided that Koniag was to quitclaim its interests in the land to Stratman, but Koniag no longer had any interest in the surface rights; the surface rights instead belonged to Leisnoi, which was not a party to the settlement agreement. Leisnoi had been merged with Koniag at the time of the settlement, but the merger

was later invalidated in state court proceedings[5] and Leisnoi was reconstituted as a separate corporation with the right to receive the surface estate in the lands it had selected under ANCSA. In accordance with ANCSA, 43 U.S.C. 1613(f), on November 21, 1985, the Department of the Interior conveyed patents for the lands selected by Leisnoi. The surface estate was patented to Leisnoi, and the subsurface estate was patented to Koniag. As called for by the settlement agreement, Koniag tendered the quitclaim deed to Stratman. Stratman, however, refused to accept the quitclaim deed because it did not convey the surface estate to the land. Stratman also refused to pay Koniag the $233,099.50 called for by the agreement. Leisnoi refused Stratman's demand that

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[5] After the district court dismissed Stratman's action in 1978, but before the court of appeals reinstated it in 1981, Leisnoi and several other Native villages merged with Koniag, the regional corporation. After Koniag and Stratman began negotiating a settlement in the federal case, a former Leisnoi shareholder filed a derivative suit in state court to set aside the merger of Leisnoi and Koniag. The suit was based on allegations of misrepresentations in the proxy solicitations identical to those in another village's earlier successful challenge to a merger with Koniag. The Leisnoi shareholder sought a temporary restraining order from the state court to prevent Koniag from entering into the settlement with Stratman, but the court denied the restraining order. Pet. App. 38a.

The state court ultimately granted partial summary judgment to the Leisnoi shareholder, holding that the joint proxy statement, which proposed the merger of Leisnoi and other village corporations with Koniag, was misleading. Koniag entered into a court-approved settlement with the Leisnoi shareholder, which provided that the merger was void *ab initio*. See Pet. App. 16a, 39a.

it convey the surface estate to him. Gov't C.A. Br. 13-14.

Before seeking to reopen his federal lawsuit, Stratman filed suit in the Alaska superior court against Leisnoi and Koniag, seeking specific performance of the settlement agreement or, in the alternative, damages against Koniag. The superior court ruled for Stratman, but the Alaska Supreme Court reversed. The court held that because Stratman entered into the settlement agreement with full knowledge of the pending litigation challenging the merger and its possible consequences, he was bound by the doctrine of *lis pendens* to the result of the litigation invalidating the merger *ab initio* and the settlement agreement therefore was not binding on Leisnoi. Pet. App. 15a, 39a; *Leisnoi, Inc.* v. *Stratman*, 835 P.2d 1202 (Alaska 1992).

c. Stratman then returned to federal court. The district court denied his motion to reopen his original lawsuit, holding that because Leisnoi's merger with Koniag had been held void *ab initio*, the merger never occurred, Koniag could not have signed the settlement on Leisnoi's behalf, and Leisnoi could not be found to have repudiated an agreement it did not sign. Pet. App. 38a-40a. The court rejected Stratman's contention that Koniag lacked authority to stipulate to dismissal of the case on Leisnoi's behalf because the action had been dismissed by the court on Stratman's own motion, not by stipulation. *Id.* at 40a. The court further held that Stratman made a "deliberate and conscious choice" to enter into a settlement in which he might not receive the surface estate to the land, since he was aware of the pending litigation challenging the Koniag-Leisnoi merger,

the shareholder effort to prevent the settlement, and the fact that Leisnoi would regain its land rights if the merger were invalidated. *Id.* at 40a-41a; see note 5, *supra*.

d. The court of appeals reversed, holding that, under Alaska state law governing the interpretation of the settlement agreement, the agreement was not enforceable because the parties were operating under a mutual mistake of fact as to Koniag's authority to convey Leisnoi's land interests. Pet. App. 14a-15a. The court held that the district court abused its discretion in determining that Stratman had made a deliberate choice to ignore the risk that Leisnoi might not be bound to make the conveyance, because Stratman could not have anticipated that Koniag would later enter into a settlement in the demerger litigation that would declare the merger "void ab initio." *Id.* at 16a; see note 5, *supra*. The court of appeals remanded the case to the district court with instructions to vacate the judgment of dismissal and to reopen the litigation. Pet. App. 19a.

ARGUMENT

Petitioner contends (Pet. 11-17) that the court of appeals incorrectly granted relief from judgment under Federal Rule of Civil Procedure 60(b)(6). Petitioner also argues (Pet. 17-27) that Stratman was not entitled to actual notice of the village eligibility proceedings concerning Woody Island in 1974, and asserts (Pet. 27-30) that he does not have standing to maintain the underlying action. Although we believe that the court of appeals erred in various respects, we do not believe that review by this Court is warranted because the case is in an interlocutory posture as a result of the court of appeals' remand to the district

court for further proceedings[6] and because the errors in the decision below are limited in their effects.

1. Petitioner urges review (Pet. 12-14) in order for the Court to exercise its supervisory authority to clarify that if relief from judgment is based on a mutual mistake of fact, relief is available only under Federal Rule of Civil Procedure 60(b)(1), and not under Rule 60(b)(6), on which the courts below relied. Petitioner argues that the Court should resolve an asserted conflict in the courts of appeals concerning the effect on Rule 60(b) motions of state court rulings on the validity of a settlement agreement (Pet. 14-15), and that, in ordering relief from judgment, the court below failed to give full faith and credit to the Alaska Supreme Court's opinion (Pet. 15-17).

We agree with petitioner that the court of appeals erred in applying Rule 60(b)(6) to relieve Stratman of the consequences of his decision to enter into a settlement with Koniag while the litigation challenging the merger of Leisnoi and Koniag was pending. Specifically, the court erred in holding that the settlement was entered into under a mutual mistake of fact and that Stratman did not assume the risk that Koniag's authority to convey Leisnoi's interests could be compromised by the pending litigation. The court of appeals' rulings were in derogation of the Alaska Supreme Court's prior finding that Stratman had "actual knowledge" of the then-pending claims against Koniag and the potential

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[6] See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & A.R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see also R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* § 4.18, at 195 (7th ed. 1993).

effects of those claims, and that Stratman's interest in the settlement agreement was therefore "subject to * * * the risk that Koniag's authority over the disputed land would be compromised in the resolution of the demerger litigation." *Leisnoi, Inc.* v. *Stratman*, 835 P.2d at 1209.

Review by this Court is not warranted, however. The court of appeals' opinion purports to distinguish, rather than contradict, the Alaska Supreme Court's prior decision concerning the impact of the settlement agreement. See Pet. App. 15a. Petitioner concedes (Pet. 15 n.28) that the decisions of other courts of appeals that he cites in asserting a circuit conflict regarding the impact of state court rulings on settlement agreements are, in fact, distinguishable, and that "it is unclear how these cases should be applied to the instant case." Moreover, the decision below is inextricably bound up with the unusual factual circumstances of this case, and, as a result, it is of little precedential significance for future Rule 60(b) litigation.

2. Petitioner contends (Pet. 17-25) that the court of appeals erred in 1981 when it held that Stratman was entitled by due process to actual notice of the village eligibility proceedings. In petitioner's view, there was no deprivation of property at stake that gave rise to any notice requirement. Petitioner also challenges (Pet. 26-30) the court's 1981 ruling that Stratman had standing to seek judicial review of the Secretary's determination of a Native village's eligibility under ANCSA, arguing that ANCSA was not enacted for the specific purpose of protecting or conserving natural resources and that ANCSA

provides other means for protecting recreational interests during the land selection process.

We agree with petitioner that the court of appeals erred in holding that Stratman was entitled to actual notice of the village eligibility proceedings. Even if the court of appeals' erroneous ruling would have merited the Court's review in 1981, however, it does not merit review now. ANCSA, enacted in 1971, required that village eligibility determinations be made "within two and one-half years from December 18, 1971." 43 U.S.C. 1610(b)(2) and (3). The process of determining village eligibility concluded in 1974, and all lawsuits challenging the results of that process, except for this one, were resolved by 1981.[7] This is the last pending lawsuit challenging the Secretary's determination of a village's eligibility under ANCSA. A decision by this Court clarifying the rights of interested parties to notice of village eligibility determinations, or determining whether recreational users have standing under ANCSA to challenge village eligibility determinations, would have no application beyond this case.[8]

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[7] There has been more recent litigation concerning the eligibility of native *groups*. See *Chugach Alaska Corp.* v. *Lujan*, 915 F.2d 454 (9th Cir. 1990); *Minchumina Natives, Inc.* v. *United States Dep't of the Interior*, 51 F.3d 220 (1995), as amended on denial of reh'g, No. 93-35841, 1995 WL 423198 (9th Cir. July 18, 1995). Native groups, however, are subject to eligibility procedures different from those that apply to Native villages. Compare 43 C.F.R. 2651.2 (eligibility requirements for native villages) with 43 C.F.R. 2653.6(a) (eligibility requirements for native groups).

[8] We note as well that the Senate recently passed a bill to amend ANCSA that would, *inter alia*, confirm that the Native village of Woody Island is an eligible Alaska Native village

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1995

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under ANCSA and that Leisnoi, Inc., is the village corporation for the village of Woody Island. H.R. 402, 104th Cong., 1st Sess. § 109 (1995); 141 Cong. Rec. S11,343 (daily ed. Aug. 3, 1995).

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No. 94-2074

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OCTOBER TERM, 1994

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Petitioner,

v.

OMAR STRATMAN, *et al.*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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12 pp

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BRIEF FOR THE PETITIONER, KONIAG, INC. IN REPLY TO FEDERAL RESPONDENT'S OPPOSITION

On two occasions, the Ninth Circuit Court of Appeals has erroneously ruled against Petitioner Koniag, Inc. The federal respondent in opposition agrees with Koniag, Inc. on this account. Brief for the Federal

Respondent in Opposition (Opposition), pp. 9-12. Nevertheless, the federal respondent contends that review by this Court is not warranted "because the case is in an interlocutory posture as a result of the court of appeals' remand to the district court for further proceedings and because the errors in the decision below are limited in their effects." Opposition, pp. 9-10. Koniag believes, however, that despite the interlocutory posture of this case, review by this Court is warranted.

ARGUMENT

As a general rule, this Court does not review cases in an interlocutory posture. However, the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) is not limited to final judgments, and in the appropriate circumstances, this Court has reviewed interlocutory orders from the courts of appeals. *See, e.g.*, *Estelle v. Gamble*, 429 U.S. 97, 98 (1976); *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 685 & n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 & n.2 (1947). For example, this Court has granted certiorari when the issue sought to be reviewed was "fundamental to the further conduct

of the case." *Larson*, 337 U.S. at 685 n.3 (quoting *Land*, 330 U.S. at 734 n.2). In the instant case, the issues raised by Koniag, Inc. are fundamental to the further conduct of the case. If this Court decides in Koniag, Inc.'s favor on any one of these issues, this case must be dismissed. Therefore, Koniag, Inc. contends that review by this Court is warranted notwithstanding the interlocutory posture of this case.

Furthermore, the federal respondent understates the potential effect of the Ninth Circuit's rulings. The first issue raised by Koniag, Inc. is whether the Ninth Circuit erroneously granted relief from judgment pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. Petition, pp. 12-17. This Court has on numerous occasions granted certiorari to determine the proper construction of the federal rules of civil and criminal procedure. *See, e.g.*, *Ackermann v. United States*, 340 U.S. 193, 198-200 (1950) (discussing Rule 60(b)(6)); *Hickman v. Taylor*, 329 U.S. 495 (1947); *Upshaw v. United States*, 335 U.S. 410 (1948); *Southern Construction Co. v. Pickard*, 371 U.S. 57, 60 (1962);

Schlagenhauf v. Holder, 379 U.S. 104, 109 (1964). The instant case presents an opportunity for this Court to place significant limitations on the relief available under Rule 60(b)(6). Specifically, Koniag, Inc. requests that this Court find that "mistake," at least in itself, is not a sufficient reason to grant a Rule 60(b)(6) motion. Petition, p. 13. In addition, the Ninth Circuit's 1994 ruling raises important "Full Faith and Credit" issues. Petition, p. 16. Accordingly, Koniag, Inc. has argued that Rule 60(b)(6) should not be construed to allow a party to collaterally attack a state court judgment.[1] Petition, p. 17. Therefore, although this case contains some "unusual factual circumstances," *see* Opposition, p. 11, it presents an opportunity for this Court to address legal principles and rules of potentially broad application.

The Ninth Circuit's 1981 ruling also presents several important legal issues concerning due process and standing. Petition, pp. 17-30. Nevertheless,

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[1] Alternatively, the Court may adopt the analysis set forth in *Stipelcovich v. Sand Dollar Marine, Inc.*, 805 F.2d 599 (5th Cir. 1986). *See* Petition, p. 14.

the federal respondent contends that even if "the court of appeals' erroneous ruling would have merited the Court's review in 1981,...it does not merit review now." Opposition, p. 12. The federal respondent notes that all village eligibility cases have been resolved except for this one. *Id.* This is true, but largely irrelevant. The Ninth Circuit's 1981 ruling is significant because it may affect the finality of the administrative eligibility determinations by subjecting them to collateral attack by third parties who hold similar interests in land. This was the argument presented by the federal defendant when it moved for relief from the district court's 1976 order. Appendix J to Petition, pp. 47a-48a.

Moreover, even if the Ninth Circuit's 1981 ruling does not affect village eligibility cases specifically, it could have an effect beyond the context of ANCSA. Clearly, the cases cited by Koniag, Inc. on pages 17-23 of its petition show that the due process issues raised by Koniag, Inc. have a general relevance to land management and regulation. In addition, Koniag, Inc.'s discussion on pages 27-30 raises issues which, if decided

in Koniag, Inc.'s favor, could place significant limitations on "recreational interest" standing.[2]

Finally, even if this case has limited precedential significance, it is, nevertheless, important to the administration of ANCSA.[3] It will affect ANCSA corporations throughout the state and affect the nature of the settlement agreement generally.[4] For example, the decertification of Leisnoi, Inc. may entail a complete reallocation of land and benefits between the various ANCSA villages and regional corporations. *See* 43 U.S.C. §§ 1605, 1610. Decertification may also affect the massive land exchange which was accomplished through section 1427 of the Alaska National Interest Lands

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2 The Ninth Circuit's 1981 ruling has been cited in Wright, Miller & Cooper, 13 Federal Practice and Procedure §§ 3531.7 n.37, 3531.8 n.5 (2d ed. 1984) for the proposition that recreational users of land have standing.

3 On several occasions, this Court has granted certiorari to resolve an issue which is important to Native American affairs. *See, e.g., Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 353-54 (1962); *Northwestern Bands v. United States*, 324 U.S. 335, 337 (1945).

4 The settlement provides for the distribution of some forty million acres of federal land and $962,500,000 to Alaska Natives. Petition, p.4.

Conservation Act. Whatever the final outcome, there will undoubtedly be post-decertification litigation, and this is contrary to Congress' express declaration of policy that the settlement be accomplished rapidly and without litigation. 43 U.S.C. § 1601(b).

CONCLUSION

The Ninth Circuit has erroneously ruled against Koniag, Inc. and Leisnoi, Inc. on two occasions. Opposition, p. 9. Koniag, Inc. has no other avenue to correct these errors and remedy this injustice. Therefore, Koniag, Inc. respectfully requests this Court to grant Koniag, Inc.'s petition for a writ of certiorari.

Respectfully submitted,

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